RAPPORTS SUR LES DIFFÉRENTS POINTS DU PROGRAMME-MINIMUM

3ième PARTIE

ORGANISATION CENTRALE
POUR UNE PAIX DURABLE

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Organisation Centrale pour une Paix durable
Zentralorganisation für einen dauernden Frieden
Central Organisation for a Durable Peace
SECRÉTARIAT: RAAMWEG 24, LA HAYE (HOLLANDE)

Recueil de Rapports

SUR LES DIFFÉRENTS POINTS DU PROGRAMME-MINIMUM

TROISIÈME PARTIE



LA HAYE
MARTINUS NIJHOFF
1917

PROGRAMME-MINIMUM.

1. Il n'y aura ni annexion ni transfert de territoire contraire aux intérêts et aux voeux de la population; le consentement de celle-ci sera obtenu, si possible, par plébiscite ou autrement.

2. Les Etats garantiront aux nationalités comprises dans leur territoire l'égalité civile, la liberté religieuse et le libre usage de leur langue.

3. Les Etats conviendront d'introduire dans leurs colonies, protectorats et sphères d'influence la liberté commerciale, ou tout au moins l'égalité de traitement pour toutes les nations.

4. L'oeuvre des Conférences de la Paix tendant à l'organisation pacifique de la Société des nations sera développée.

La Conférence de la Paix sera dotée d'une organisation permanente et aura des sessions périodiques.

5. Les Etats conviendront de soumettre leurs différends à une procédure pacifique. Dans ce but à côté de la Cour d'Arbitrage de la Haye, seront créés a) une Cour permanente de Justice internationale, b) un Conseil international d'Enquête et de Conciliation.

6. Les Etats seront tenus à prendre de concert des mesures diplomatiques, économiques ou militaires dans le cas ou un Etat agirait militairement, au lieu de soumettre le différend à une décision judiciaire ou de recourir à la médiation du Conseil d'Enquête et de Conciliation.

7. Les Etats conviendront de réduire leurs armements.

8. Pour faciliter la réduction des armements navals le droit de capture sera aboli et la liberté des mers assurée.

9. La politique étrangère sera soumise à un controle efficace des parlements.

Les traités secrets seront nuls de plein droit.

PRÉFACE DE LA PREMIÈRE PARTIE.

Fin Septembre 1915 „l'Organisation Centrale pour une Paix Durable", de concert avec „l'Association suisse pour l'Etude des bases d'un Traité de Paix Durable" et le Groupe Suisse de l'Union Interparlementaire, invita un certain nombre de personnes influentes, occupant des places prépondérantes dans différentes organisations internationales, d'assister à un Congrès International d'Etudes qui aurait lieu à Berne du 14 au 18 décembre 1915.

On ne visait aucunement, par ce congrès, à activer la conclusion de la paix, son but unique étant: 1. d'étudier les bases de l'organisation de la société des nations, en tenant compte des conclusions pratiques et concrètes qui pourront amener les peuples à se mieux comprendre après la guerre: 2. de saisir les gouvernements et l'opinion publique du résultat de ces études.

Cependant, malgré des efforts réitérés et malgré notre déclaration spéciale de nous borner absolument au but indiqué ci-dessus, il ne nous a pas été donné d'amener des Français de marque à participer au congrès, ne fût-ce que par l'envoi de rapports écrits.

D'autre part, des amis d'Amérique nous ayant priés télégraphiquement de remettre le congrès jusqu'en avril 1916, il fut décidé, pour ces deux motifs, de ne pas réunir le congrès et de l'ajourner provisoirement.

De plus, les difficultés de voyage qui ont surgi depuis, nous ont démontré qu'il n'y a pas moyen de tenir un congrès international dans les circonstances actuelles. Il fut donc décidé à l'unanimité que le travail, entrepris pour la préparation scientifique d'une paix durable, serait continué par des Commissions d'Etudes Internationales.

Entretemps plusieurs personnes de marque, de pays belligérants et neutres, avaient consenti de collaborer au Congrès et différents rapports scientifiques, élaborant les neuf points du Programme Minimum de „l'Organisation Centrale pour une Paix Durable" et pouvant servir de

base aux discussions du congrès de Berne, avaient été envoyés au Bureau.

Grâce à la bienveillance des rapporteurs, le Bureau a l'avantage de pouvoir soumettre au public la première partie d'une collection des rapports en question et de ceux qui lui sont arrivés ultérieurement. Chacune de ces études peut être considérée comme l'expression de l'opinion de personnes belligérantes et neutres, qui tout en s'abstenant de provoquer une fin des hostilités immédiate, s'occupent déjà de l'étude des conditions auxquelles la reconstitution de l'Europe, dans une paix offrant le maximum de chances de durabilité, pourrait avoir lieu.

Nous avons l'espoir que ces rapports rendront de grands services aux membres des Commissions Internationales d'Etudes de notre Organisation Centrale, en vue de leurs travaux. D'ailleurs tous ceux qui se préoccupent des problèmes dont ils traitent, pourront y trouver des renseignements utiles pour leurs études.

Dans leur ensemble ils présentent un témoignage de l'harmonie de sentiments qui existe entre des sujets de différents pays à l'égard des principes fondamentaux sur lesquels il faudra construire la paix future.

Pour conclure nous exprimons l'espoir que les pages suivantes contribueront largement à augmenter le désir, germant partout, d'étudier et de répandre les principes qu'elles préconisent, afin de collaborer à l'établissement prochain d'une paix juste et durable.

Au nom du Comité Exécutif,

Dr. H. C. Dresselhuys,
Président,

Dr. B. de Jong van Beek en Donk,
Secrétaire.

La Haye, juin 1916.

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II. PROBLÈME DES NATIONALITÉS

THE PROBLEM OF NATIONALITY

BY

DR. KARL HILDEBRAND, SWEDEN.

In the opinion of many persons there is no *problem* of nationality. They lay down as a postulate that as a matter of course, which need not be discussed, the nations have the right to decide their own fate. But the deeper we study the state of things, the clearer we understand that the questions of nationality in fact are problems, and the more difficult we find their solution.

The question of the significance of nationality and national right of self-determination in its modern comprehension was formed during the 18th century and therefore is not yet one hundred years of age. Nevertheless it has caused much trouble and holds a central position in the foreign and internal politics of the present time. Almost everywhere the right of naionality theoretically meets with recognition, although to our regret we must state, that in practice the nations mostly are apt to look away from their own nationality problems and direct their claims for national justice to other states and peoples. Russia is enthusiastic for the liberation of the Bohemians and Southern Slavs, but has not shown any sympathy for the struggle for liberty of the Poles and Finlanders. The Poles

in Russia, Austria and Germany demand their full national independence, but at the same time five million Poles in possession of power have in Galizia dealt harshly with four million Ruthenes, caring little for their national demands. The Magyars of Hungary form a nation of great unity and with a passionate love of freedom, but at the same time they have lacked the capacity of respecting the claims of the Roumainians and Croats in Hungary. Italy has made war to regain her *Irredenta,* but has no consideration for the Italian-speaking populations of Corsica and Malta, and directs herself solely against Austria in order to redeem a territory with a population of 300,000 Italians, although — because of the promiscuous races — a still greater number of Slavs and Germans would follow. Germany presents herself as one of the most powerful national states of Europe, but has nevertheless rejected the demands for national culture on the part of the populations of conquered bordering territories. France reclaims Alsace-Lorraine without any consideration of the fact, that the German-speaking part of the population is much more numerous than the French. In England the great war interrupted a peculiar development of the Irish question, in which the military preparations — ominous of a revolution in order to fight for national independence — played the most prominent part.

Even a rough sketch might make clear the pecularity of the question of nationality. The idea of nationality as such is grand and noble. It is capable of firmly unifying a multitude of individuals and force them to

grand achievements. It gives life and power to the nations and stimulates a richer culture. But at the same time it must be remembered, that it might with the force of dynamite blow up perfectly vital political edifices. The universal culture is developing by the constant reciprocal action of different peoples and different national cultures in the same way as the reciprocity of the individuals is the foundation of the development of a people. The idea of nationality is an eminently strong promotor of culture, but exagerated it will turn its enemy. In Austria-Hungary we find nine different nationalities, each in most cases divided in many smaller consistuents. If now each locally limited part of these nationalities should win perfect independence, it would doubtless throw far back the development of Austria-Hungary. An exagerated and unsound application of the idea of nationality would also earnestly endanger the culture of the U. S. A., and it could hardly be a gain to the world if Switzerland was broken in three parts, one of which became united to Germany, one to France and one to Italy. The Swizz Confederation is an excellent proof of how the idea of nationality can subordinate to the idea of the State. The unexpectedly good concord of the peoples of Austria-Hungary in spite of the enormous ordeal of the Great war is another convincing illustration.

The theoretical defenders of the principle of nationality often make the mistake of trying a division of the world only upon the lines of nationality and do not pay any consideration to the fact, that *the principle of nationality certainly is one of the stron-*

gest consistuting powers of the state, but not the only one.

What is after all the characteristic feature of a nation? Usually the answer will be: The community of language. But it springs from a very superficial way of thinking, easily disproved with som few statements. The predominant language in U. S. A. is English, but yet there is a distinct difference between the American and the English nation. On the other hand we are perfectly entitled to speak of the Swizz nation, although it is divided in three different groups of language.

Another answer is, that the national partition is founded upon difference of race. This is contradicted by the fact that almost every nation in Europe is the product of the intermingling of different races during many centuries. Celtic, Germanic and Latin blood is running in the veins of the French people. The Germans of the North have a great admixture of Slavic, the Italians of Germanic blood. Community of language and congenerous origin generally promote the formation of a nation, but its fundamental characteristics must be searched elsewhere.

It is the consiousness of solidarity which constitutes a nation. It is the memory of sufferings, born in common, and victories, jointly won — it is the will to stand together in order to protect common interests against external oppression, the feeling of responsibility in administering the cultural inheritance of the ancestors in order to leave it in a richer shape to future generations. The national feeling is a tissue of memory and traditions, of duties and responsibility, of the aims of the present and the hopes of the future — all united

in the consiousness of solidarity in the hour of distress and danger.

A nation is not possible without national conscousness. A multitude of individuals of the same race and speaking the same language do not constitute a nation, if they do not consider themselves a national community and have the joint will of common national development. The people of Ukranie has many peculiarities, which distinguish it from the population of Great Russia, for instance a language and a literature of their own and ancient historical traditions, and much has been written about its detachment from the Russian Empire. I have studied a considerable part of the literature available upon this matter, but although here a population of more than 30 millions is in question, I have not been convinced of its capacity of living its own national and political life. *The will* of constituting a nation seems to me to be missing.

A look on Europe shows us the small coincidence of the national and the political boundaries. There is one division according to Nationalities and another according to States. Many are of the opinion that the welfare of humanity claimes an adjustment of the frontiers between the states in order to adapt them to the national borders. But this opinion is too abstract and centainly most erroneous. In some cases the political frontiers would be comparatively slightly displaced, but already such changes would raise the exasperated resistance of the people, which was to lose part of its political territory. In other cases the present political organizations would be perfectly broken. Already the

great variety of the cases ought to form an earnest warning against a sweeping judgement.

Denmark forms a perfect national unity without differences of race or language. But in the German North-Schleswig 150.000 Danes are living and an adjustment of the frontiers according to the principle of nationality would increase the political territory of Denmark at the expence of Germany. That such an adjustment can not be made without using force, and that this is out of question from the side of little Denmark goes without saying.

Sweden is another instance. The population as a whole is very homogeneous, but in the remotest northern part of the country 25,000 Finlanders and 7,000 Lapps are dispersed over a territory of considerable expance. On the other hand 350,000 Swedes are living in Finland. In this case it is practically impossible to adjust the political frontiers according to the ethnographic situation. To this may be added the remark, that in the northern part of Sweden primary education is conveyed in the Finnish and Lappish languages and that both these languages are used by the divine service and for the proceedings of the lower courts of justice. At the same time however arrangement have been made for disseminating knowledge also of the Swedish language among the Finlanders and Lapps.

Analogue to this is the situation of the Basques in South France. They form a peculiar national unity between the French and the Spaniards, a remnant of an ancient national dispersion. In their case also great con-

sideration is shown to the national language. I myself have attended divine service in the Basque tongue in a small city.

A considerable majority of the 70 millions inhabitants of the German Empire are of purely German origin. In 1910 92 % indicated German as their mother tongue. Besides this Germans are living in Switzerland and Austria-Hungary, An adjustment of the political frontiers in conformity to the national boundaries would break up the Swizz Confederation and the Austrian Empire, conveying to Germany 2,6 millions Swizz and 10 millions Austrians. Such a victory of the absolute idea of nationality would lead to the most curious political formations. In Bohemia the Germans are living in the bordering territories, enclosing the Bohemians in the middle of the country; should then the Bohemians be involved in a Greater Germany, or should this new Empire project a thin branch between Slav national and political provinces? Besides more than 2 million Germans are living in Hungary, who never could come into geographical connection with a Greater Germany; were they perhaps to form a German state of their own? That alternative is also out of question, because they are living scattered in small locally separated areas.

If the principle of nationality should be carried out absolutly in drawing up the frontiers in this case, it would either result in a great many small German dominions within the Hungarian Kingdom, all of them insignificant and without vital power, *or* an enormous popular displacement must take place in order to re-

move the Germans in one direction, the Slavs in another, while the Magyars were to keep the principal part of the country.

From national point of view Belgium is divided in two parts: the Walloon, where the inhabitant race is Romanic, and the Flemish one, with a Germanic population. They have fought each other bitterly, until in 1897 an agreement was made, guaranteeing the official equality between the French and the Flemish languages [1]). The unity of Belgium is of political, not of national nature.

The question of national and political boundaries becomes still more entangled by the new dislocations, which are continually going on in the expansion and stable settlement of the nations. The nationalities of the present age are a product of the historic development and the preposition that this development should now have come to an end, and that the future should bring no change in the present national conditions, is purely naive. The current of Time and Development will make its way and can not be stemmed. The growth of population is greater in the German than in the Roman countries, still greater among the Slavs and absolutely the greatest among the yellow peoples of East Asia. The result of this will perhaps be a pressure westward of China on Russia, of Russia on Germany, and of Germany on France in the form of an immigration — in the beginning unnoticed but bye-and-bye continually increasing — of farmlabourers, artisans,

[1]) Compare i.e. *J. Dover-Wilson:* The National Idea in Europe, page 44 (The war and democracy, chapter II, London 1915.)

industrial workers and trades-men from more to less overpopulated countries. Popular dislocations of this kind may already be noticed. Polish colonists and workers have already in increasing numbers appeared in the eastern part of Germany, farmlabourers from Galizia have performed season-work in Germany, Denmark and Sweden. During the war the eyes of France have been opened to the considerable immigration of German workingmen, waiters, engineers and tradespeople. Where such a popular displacement has been going on for some time, a territory may change its national aspect; a new language will become predominant, new customs, perhaps a new religion. When this has become a fact, the champions of the abstract idea of nationality must claim the adjustment of the political frontier according to the new situation, in other words the expansion of one state at the cost of another. Is there realy anybody who believes, that such regulations could be quietly and peacefully performed only because of an application of the idea of nationality, supposed to be right. It would in fact be very surprising if this would be the case.

Even those, who are most enthusiastic upon the subject of the right of the nationalities to lead their own life, will become doubtful upon a closer study of the facts. Any attempt to change the map of Europe in order to bring the political frontiers into conformity with the national boundaries will meet with enormous difficulties, arouse the national passions and egg the peoples on against each other. What was meant to be the basis of a durable peace would turn out the source

of a durable period of war. In some respects the carrying out of the program would bring about direct damage to culture, even if it should be realized without bloodshed. And if it in spite of all could be carried out, the new political organizations conform to the nationalities would have no stability, but a regulation of the frontiers must take place perhaps every twenty or fifty years in consequence of popular movements and shiftings of the national boundaries.

It is in fact impossible to solve the enormous and entangled problem of nationality in connection with the conclusion of peace between the powers now at war. For the sake of the durability of the coming peace, we must eagerly hope that only such questions of political and national character will be taken up for consideration, as are decidedly connected with the origin of the war and its obvious results. We may be perfectly convinced, that anyhow the nearest peace-problem — the transformations of the state of war into a state of peace — will offer enough and to spare of almost insuperable difficulties. It is not good sense — and certainly it is not in the interest of peace, — to put another obstacle in the way of the peace.

* * *

It has not been my intention by the aforesaid to depreciate the gravity of the problem of nationality. It has only been my wish somewhat to aid to a necessary limitation and a more correct expression of the part of the question, which is of significance for the present situation. My starting point might in a few

words be expressed thus: A homogeneous nation, with a fervent spirit of independence is the best foundation of a firm political organization. But even where the population is very heterogenous, economic and other conditions form a natural and expedient basis of unity of peoples, belonging to different races and languages, political communities may be founded and subsist, developing into sufficient power, a perfect national idea may ensue and the culture of the peoples be immensely promoted.

A first consequence of this seems to me to be that in the interest of European culture and of the coming peace, the already much debated problem of nationality should not become still more entangled by the peace treaty. Annexations of peoples, belonging to another race and speaking another tongue, very seldom increase the power of the conqueror, at least not during the near future, and maintain also the animosity and the hope of revenge of the nations, at the cost of which the annexations are made. I in no way hold that the neutral peoples will be able to influence the decisions of the belligerents at the conclusion of peace, which certainly will be settled now as ever before according to the military situation and the popular opinion within the belligerents themselves. But a wave of wishes and hopes might stream forth from the side of the neutrals and foremost among these hopes stands the vivid wish, that the war might not lead to the victory of the policy of annexation. I am perfectly aware, that a tremendous war cannot end by the restitution of the „*status quo ante*", if this is meant to be the re-es-

tablishment of every yard of the old frontiers. Smaller regulations might always be considered without endangering the peace, but it will certainly prove disastrous if greater territories were transfered from one state to another in order to be directly incorporated. I am not sure about the expediency of discussing any detailed peace conditions without being perfectly familiar with the actual state of affairs and therefore I will limit myself to the preceeding general statement.

I am also convinced that it will chiefly be after the end of the war that the European peoples will have to take up in earnest their problems of nationality.

It is not generally understood that the public mind has fixed its attention upon these problems only so far as the rights of the peoples is concerned, without taking into consideration their being at the same time national and international problems. The idea of coincident political and national frontiers — an idea generally impossible to carry out in practice —, has deeply impressed public opinion in many respects. In some cases a state, which has formerly lost some parts of its territory, has maintained a desire for their reconquest. In other cases, the conquering state has wished to oppress within the annexed territories such national characteristics, as were common for the people in the state, with which the territories were formerly united. Some great powers have consequently and roughly attempted to introduce into conquered borderlands their national culture at the cost of the already existing and inherited national culture. This seems to me to be founded upon an erroneous overrating of the

significance of the nationality to the political organization. In the leading circles the idea seems to have been this: Because a state, holding within its dominion subjects of different nationality and with different cultural characteristics, cannot be sufficiently powerful, it is necessary to stamp out perfectly the independent life of the national minorities. In this round about way the idea of nationality has led to an oppression from the side of the national majority with a view to create within the political dominion a homogeneous national culture.

The war has offered new proof of the advantage of the idea of State over the idea of nationality. Poles and Danes have fought in the German armies. The peoples of Austria-Hungary have stuck together remarkably well and the appearance in the wartime of a common Imperial banner is no empty form, but the clear expression of a living reality. France and England have called for the assistance of the armies of the Dominions and Colonies. We have already seen in Switzerland and U. S. A. examples of firm political unions containing several different national cultures, and now we have further proofs that the political frontiers are more solid than the national boundaries. This matter can only be investigated thoroughly after the peace, but it might be allowed already now to make some conclusions, which will be of great importance to the future treatment of the problem of nationality.

If the modern political organization has the power to keep together the different nationalities even during the great war, the gravest argument for suppres-

sing the language and culture of the national minority will cease to exist. Then a different view will manifest itself in the interior political treating of the questions of nationality, and therefore we might hope for greater freedom for the national minorities within the states. This will lead also to great international advantages. The attempt of an annexing power to suppress the national characteristics of annexed territories, has tended above everything else to keep up the agitation of the people which had lost part of its dominion. Every messure of this kind has irritated the national sensitiveness of the inferior people. A radical change in this sphere of the interior politics will react favourably on the mutual relations of the states. It would be a great gain both to the peacework and the culture.

The internal national questions of the states are exceedingly difficult to treat. I believe that all countries with a heterogeneous population must with the utmost seriousness set to work at these difficulties and try to find the possibilities of a very important development, *The efficacy of a new political line of action can scarcely be found but in an enlightened and alert public opinion in the contries aware of the dangers of the suppression of the minorities and interested in a farsighted politics.* A good deal of work is needed in order to form this opinion, but here are also greater possibilities of attaining a positive issue, than in proclaming far reaching exigencies in connection with the coming peace-conclusion.

There are moreover several practical attempt alre-

ady made and several proposals ready, which might be used. In the Austrian Moravia for instance, there have several years ago been introduced different national voting lists for the Bohemian and German voters, including the right of every qualified elector to be inscribed in the one or the other in order to give his vote at the different national elections of the district. In this way it is possible for the minority of some districts to be supported by the majority of other, and the different nationalities are more justly represented.

It would probably be possible to propose and carry through certain minimal claims after the conclusion of peace. The most primitive demand is certainly that divine service should be held in the national tongue. Next comes the claim for popular education in the language of the people and the right to use this language at the proceedings of the subtribunals and in lower offices of public administration, in printed documents, for lectures and dramatic performances. Where an official language also exist, it ought as a matter of course be taught in the public schools, because this language — also as a matter of course — must be solely used in some cases, e. g. in commanding the army, within the central administration etc. Other rights expedient or possible to carry out, might vary in the different cases, from the aforesaid minimum claims to new forms for autonome administration. I am, in fact, bold enough to hope, that in some cases autonomy may be granted, where it is justified by the fact that the population of a certain clearly limited territory is broadly speaking homogeneous. I am

also foreseeing that the national minorities will be granted common political rights, such as municipal and political suffrage, equality before the law, etc.

As I have remarked before, this new apprehension of the conditions of the national minorities must be brought forth separately in the different countries. But international reciprocity will of course be of great advantage. If any regulation of such national political questions might possible be settled by international agreement, seems to me, however, very doubtful.

* * *

My comprehension of the problem of nationality, stated above, might be summed up as follows:

1/ A homogeneous population constitutes the best and firmest foundation of a political organization.

2/ The historical development, however, having resulted in political organisations with — as far as the race is concerned — very heterogeneous populations, gives several proofs that even in such cases different national elements might be united in one political idea — still more, they might be moulded into a new, perfectly joint consciousness of national solidarity.

3/ Under such circumstances it is impossible and might turn out ruinous to the progress of civilization to attempt any application of an abstract idea of nationality in order to displace the political frontiers in conformity with the national boundaries.

4/ It is preposterous to claim that the questions of nationality should be treated in all their motley va-

riety in connection with the coming peace-negotiations, which ought to be limited only take up for consideration such national and political questions as have become important because of the military operations.

5/ As to the terms of peace it must be emphasised, that it is desirable, that no territory of any larger extent might be transfered from one state to another in order to be incorporated in the conquering state, because annexations usually cause continuall distrust and hatred between the peoples, ferment the revange policy and render the peace work more difficult.

6/ The problem of nationality is, however, not only of international importance but also important to the interior politics of the states, and seems from this point of view under the present situation to be far more consequential. The interior national policy is determined — or might be influenced — by an enlightened popular opinion within the states concerned, and it is therefore of great importance that the questions of nationality be thoroughly investigated.

7/ The war has presented new proofs of the tenability of political organizations with a heterogeneous population. This victory for the idea of the State shows that there is no reason for a national majority to stifle the cultural characteristics of the minority.

8/ After the peace the inner national questions will probably play a prominent part and states with a heterogeneous population will with necessity have to take them up for earnest consideration.

9/ It would then be good, if certain minimum claims

of the national minorities of the states could be granted and it could be decided according to the circumstances in each case what more might be allowed. New forms of autonomy would perhaps in some cases be considered.

10/ It is of the greatest importance that the questions of nationality not be treated merely on abstract and general principles. Each special case must be investigated and upon the results of such investigations the conclusions should be founded.

ZUR NATIONALITÄTENFRAGE.

VON

DR. RUDOLF LAUN, OESTERREICH.

Artikel II des Mindestprogramms der Zentralorganisation für einen dauernden Frieden sagt: „Les Etats garantiront aux nationalités comprises dans leur territoire l'égalité civile, la liberté religieuse et le libre usage de leur langue".

Die beiden ersten der drei hier aufgestellten Forderungen, bürgerliche und religiöse Freiheit, bedürfen heute für Kulturstaaten im Allgemeinen wohl keiner prinzipiellen Erörterung. Dasselbe darf vielleicht auch vom freien Gebrauch der Sprache behauptet werden, soweit man an den *privaten* Gebrauch denkt, wenngleich es beispielsweise nach Zeitungsnachrichten in Russland während des Krieges dazu gekommen sein soll, dass dort der Gebrauch der deutschen Sprache verboten wurde.

Dagegen greift der freie Gebrauch der Sprache durch das Individuum, sobald man ihn nach allen Seiten hin gewährleisten will, über die private Sphäre des Einzelnen in den Kreis der *öffentlichen* und besonders der *staatlichen* Interessen über. Man denke nur an die Presse, an Vereine und öffentliche Versammlungen, an den sprachlichen Verkehr des Staatsbürgers mit

den Behörden, an den Unterricht, namentlich jenen der breiten Volksmassen in den Elementarschulen.

In fast allen Kulturstaaten herrscht *eine* Rasse derart vor, dass sie ihrer Sprache, zugleich der Sprache der Behörden und der Gesetze, in allen diesen Beziehungen eine beliebig privilegierte Stellung verleihen kann, während die Sprachen anderer Rassen daneben nur mehr oder weniger geduldet werden. So entsteht ein besonderes Schutzbedürfnis der nationalen Minoritäten.

Nun leben wir in einem Zeitalter des Nationalismus. Jeder fast, mit wohl nur ganz seltenen Ausnahmen, überschätzt sein eigenes Volk. Er ergreift leidenschaftlich für dieses Partei und billigt im Allgemeinen alle Vorgänge im öffentlichen Leben und in der Politik, welche seinem Volke nützen, auch dann, wenn er analoge Vorgänge im Privatverkehr als unsittlich missbilligen und ablehnen würde, ähnlich wie man in der Aera der Religionskämpfe für das eigene Glaubensbekenntnis nach dem Grundsatz eingetreten ist, dass der Zweck die Mittel heilige. Die nationalen Minoritäten bedürfen daher selbst in demokratischen und freiheitlichen Staaten eines Schutzes, weil hier ihre Lage vom nationalen Egoismus der Mehrheit abhängt.

Selbst Personen, die sich über den brutalen Rasseneegoismus der Massen emporgearbeitet haben, Männer, deren edle Menschenliebe, friedliebende Gesinnung und aufrichtiges Streben nach Gerechtigkeit über jeden Zweifel erhaben ist, sind in der Regel nicht ganz unbefangen, sobald die Interessen der eigenen Rasse oder Sprachgemeinschaft berührt werden. Hiervon gibt uns auch der Recueil de Rapports, wie schon die

frühere Literatur, Proben. So findet der Engländer *Buxton*, der den Elsässern und Lothringern, Italienern, Finnen, Polen, Tschechen, Ruthenen, Rumänen, Serbokroaten, Bulgaren, Griechen und Armeniern die nationale Gleichheit in ziemlich radikaler Weise bringen will, auf sechs Zeilen Gründe genug, um die Iren, Inder, Aegypter und Perser von der Erörterung auszuschliessen, obwohl doch unbestreitbar zum Teile weite Schichten aller dieser zuletzt genannten Völker in der Kultur bedeutend höher stehen als beispielsweise die Masse der ruthenischen und rumänischen Bauern im Osten Oesterreichs und Ungarns, von den nicht ottomanischen Rassen der Türkei gar nicht zu reden (Nationality, S. 4; Recueil de Rapports, I, S. 52). Ebenso genügen dem Amerikaner LEVERMORE 8 Zeilen, um den afrikanischen und asiatischen Rassen in Amerika den Anspruch nicht nur auf materielle Gleichstellung, sondern sogar auf Gleichheit vor dem Gesetze („equality before the law") und unparteiische Justiz („impartial justice"), also auf rein formale Gleichstellung selbst bei materiell ungleichen Normen, abzuerkennen (Article: II of the Minimum Program, S. 3, 4; Recueil de Rapports, II, S. 269, 270). Dem Gutachten des Ungarn JASZI aber merkt man es fast in jeder Zeile an, dass er, sicherlich unbewusst, allem aus dem Wege geht, was zu ungünstigen Schlüssen über das heutige Sprachen- und Nationalitätenrecht Ungarns hinführen könnte. Ja er stellt sogar unter anderem die „notwendige prinzipielle Einheit der Kultur" der Freiheit im Gebrauch der Muttersprache gegenüber, offenbar von der Ueberzeugung geleitet, dass die Einrichtungen seines

Vaterlands, welche der ungarischen Rasse und der ungarischen Sprache ein sehr erhebliches Uebergewicht auf Kosten der anderen verleihen, eben durch jene Notwendigkeit der „prinzipiellen Einheit der Kultur" sittlich gerechtfertigt werde. (Das Nationalitätenproblem, S. 4; Recueil de Rapports, I, S. 81).

Es ist ausserordentlich lehrreich, solchen Stimmen Beachtung zu schenken. Denn sie zeigen, dass nationale Minoritäten selbst von den besten und edelsten Richtern kaum ein volles und allseitiges Verständnis ihrer Lage erhoffen können, solange diese Richter einer herrschenden Nation, einer nationalen Mehrheit entnommen werden.

Unter solchen Umständen ist die Formel des Mindestprogramms „le libre usage de leur langue" viel zu wenig, zu unbestimmt und zu vieldeutig. Sie besagt vielleicht sehr viel in den Hoffnungen, die auf sie gesetzt werden, sie würde aber, selbst wenn sie in die Gesetzgebung aller Staaten einginge, in der praktischen Politik so gut wie nichts bedeuten. „Freien Gebrauch ihrer Sprache", den haben ja, in einem gewissen Sinn, sogar alle Völker Russlands — die Deutschen während des Krieges ausgenommen, falls jene früher erwähnten Zeitungsnachrichten auf Wahrheit beruhen sollten. Es wird kaum eine noch so unbedeutende nationale Minderheit in irgend einem nur halbwegs zivilisierten Staatswesen geben, von der man nicht schon heute in irgend einem Sinn sagen könnte, sie habe „den freien Gebrauch ihrer Sprache".

Was die nationalen Minoritäten fordern oder fordern werden und was ihnen das Rechtsgefühl aller

wahrhaft demokratisch denkenden Menschen auf die Dauer nicht vorenthalten können wird, geht daher *weiter*. Es handelt sich um die Freiheit der Sprache auch in der *Oeffentlichkeit*, um deren *Gleichstellung* mit der herrschenden oder Staatssprache im Press-, Vereins- und Versammlungswesen, in Schulen, Kirchen und im Verkehr mit den Behörden, vor allem aber um einen verhältnismässigen Anteil der Minoritätsrassen bei der Besetzung der öffentlichen Aemter.

Mit Recht hat daher der Präsident der II. Internationalen Studienkommission Professor KOHT auf diese Seite des Gegenstandes das Schwergewicht gelegt, indem er in dem Programm vom 6. März 1916 die Fragen stellte:

„2.) What ought to be the rules governing the conditions of national minorities in respect to a) school organization b) church organization, c) judicial proceedings, d) political privileges?

3.) Are you able to give information about existing arrangements in individual countries where, in some respect, these problems are already worked out?"

In diesen Fragen liegt zweifellos der Kernpunkt des Problems und sie will ich im Folgenden versuchen, kurz zu beantworten. Gegen diese beiden Fragen tritt die *erste* Frage des Programms, jene nach dem Nutzen und der Möglichkeit internationaler Verträge zum Schutz der nationalen Minoritäten, verhältnismässig in den Hintergrund. Denn erst muss man darüber klar sein, was man an die Rechtseinrichtungen *der einzelnen Staaten* für Anforderungen stellen kann und soll, bevor man an *internationale* Vereinbarungen hierüber

denkt. Auch herrscht heute noch bei allen grossen Kulturvölkern nicht nur nach aussen hin, sondern auch im Staatsinnern, gegenüber den nationalen Minoritäten, ein starker nationaler Imperialismus. Man sollte daher meines Erachtens, wenn man die praktischen Möglichkeiten nicht aus dem Auge verlieren will, die schöne und edle Aufgabe, gegen diesen Imperialismus durch *völkerrechtliche* Abmachungen anzukämpfen, vielleicht vorläufig doch noch besser der Zukunft überlassen und sich inzwischen desto intensiver auf die Propaganda für *staatliche* Einrichtungen verlegen. Dabei bedürfen wir allerdings nicht so sehr eines *Minimal*programms, sondern vor allem eines *Maximal*programms dessen, was die nationalen Minoritäten *an praktisch Realisierbarem* zu fordern hätten. Was endlich die vierte Frage, besondere Vorschläge für einzelne Nationalitäten anbelangt, so habe ich hierzu in Bezug auf die allgemeinen Prinzipien, welche hier erörtert werden, nichts zu bemerken.

Es handelt sich uns demnach hier darum, zu untersuchen, wie ein Staat eingerichtet sein könne oder müsse, um den nationalen Minderheiten, deren es ja in jedem grösseren Staatswesen solche gibt, eine grösstmögliche Freiheit und Gleichstellung mit der Majoritätsrasse oder herrschenden Rasse zu gewähren. Das Problem ist im gegenwärtigen Augenblick nicht so zu stellen: welches Minimum an Freiheit und Gleichstellung ist völkerrechtlich durchzuführen, sondern so: welches Maximum ist in grossen Staaten möglich?

In dieser Hinsicht steht nun vor allen anderen Staaten der Kulturwelt die *Schweiz* als ein Idealbild vor

uns. Es fragts ich, ob nicht ihre Einrichtungen geeignet seien, den anderen Staaten als Muster für die Regelung des Sprachen- und Nationalitätenrechtes vorgehalten zu werden. In einzelnen Richtungen dürfte dies sicherlich zutreffen und es wäre eine schöne und dankbare Aufgabe für ein Schweizer Mitglied der Organisation Centrale, uns des Näheren darüber zu berichten, welche Einrichtungen seines Vaterlandes in Bezug auf das Nationalitäten- und Sprachenrecht sich zu allgemeiner Nachbildung eignen.

Allein dabei wird es sich wohl nur um *Einzelnes* handeln können. Bekanntlich liegen in der Schweiz besondere Verhältnisse vor, welche sich von denen in allen anderen Staaten wesentlich unterscheiden. Die Schweiz ist ein kleiner Staat, ein neutralisierter Staat, ein Binnenstaat ohne Kolonien. Wir aber suchen Prinzipien, die sämtliche Grossmächte und Kolonialstaaten aufs tiefste, ja an den Wurzeln ihrer Macht berühren. Die Schweiz hat es mit nur drei, an Alter und Höhe der Kultur einander ziemlich gleichstehenden Völkern zu tun. Wir dagegen wollen uns an Staaten wenden, unter deren Hoheit zehn, zwanzig Rassen verschiedenster Kulturstufe leben. Die wirtschaftliche Lage der drei Völker in der Schweiz ist eine sehr ähnliche, keines beherrscht das andere, keines ist vom anderen unbedingt abhängig. Wir aber wollen die Struktur von Staaten vor unser Forum ziehen, in denen es herrschende und dienende, ausbeutende und ausgebeutete Völker gibt, wo die nationalen Gegensätze vielfach, wenigstens im allgemeinen Umriss, mit Klassengegensätzen zusammenfallen.

Es hätte daher heute keine Aussicht auf praktischen Erfolg, wenn man etwa Russland oder England, dem Deutschen Reich oder den Vereinigten Staaten von Amerika das Nationalitäten- und Sprachenrecht der Schweiz als Muster vorhalten wollte.

Hingegen gibt es einen anderen Staat, dessen Nationalitätenrecht, so unvollkommen es auch im Vergleich mit den Idealforderungen ist, dennoch für nahezu alle anderen Staaten mit Ausnahme der Schweiz ein leuchtendes Vorbild abgeben könnte, *wenn es nur bekannt wäre :* nämlich *Oesterreich.*

Es liegt mir vollkommen ferne, diesen Staat deswegen in den Vordergrund rücken zu wollen, weil ich ein Oesterreicher bin. Dass ich an der Verfassung meines Vaterlandes auch eine herbe Kritik zu üben weiss, darüber möge mein eben veröffentlichtes Gutachten über die Stellung der österreichischen Länder bei einer künftigen Verfassungsreform (Seite 78—94 des Sonderheftes „Länderautonomie" der Oesterreichischen Zeitschrift für öffentliches Recht, Wien, Manz, 1916) Zeugnis ablegen. Allein auch eine von jedem gefühlsmässigen Einschlag befreite rein sachliche Prüfung zeigt, dass abgesehen von der Schweiz, kein Staat, der von mehreren Nationalitäten bewohnt wird, ihnen auch nur annähernd so viel Freiheit und Gleichheit gewährt wie Oesterreich.

Oesterreich — ohne Ungarn und Bosnien — wird bekanntlich von 8 Nationalitäten bewohnt, wenn man die Ladiner (in einigen Alpenthälern) und die Magyaren (in der Bukowina) wegen ihrer sehr geringen Anzahl nicht mitrechnet. Keines von den 8 Völkern

hat die Majorität, jedes von ihnen bildet eine schutzbedürftige nationale Minderheit gegenüber den anderen Nationalitäten. Oesterreich ist daher gewissermassen die Wiege des nationalen Minoritätenschutzes und damit des — so hoffen wir — zukünftigen Nationalitätenrechtes der Welt.

Im Ausland — abgesehen vielleicht von Deutschland — ist dies allerdings fast vollständig unbekannt. Namentlich in den westlichen Kulturländern wie England, Frankreich und den Vereinigten Staaten von Amerika ist die öffentliche Meinung durch oberflächliche und einseitige — wenn nicht vielleicht auch öfters durch absichtlich entstellte — Darstellungen, noch mehr aber dadurch, dass ihr die wichtigsten Tatsachen und Einrichtungen gar niemals bekannt geworden sind, zu einem völlig verzerrten Bild Oesterreichs gelangt. Es sei hier beispielsweise auf Werke wie jene von Scotus Viator (*Seton-Watson*) oder von Chéradame hingewiesen. Vor allem wird in derartigen Schriften in der Regel Ungarn gegenüber Oesterreich stark in den Vordergrund gerückt, sodass der Leser geneigt ist, sein Urteil über Ungarn auf Oesterreich zu übertragen. In Wahrheit sind beide Staaten in Bezug auf das Sprachen- und Nationalitätenrecht einander ungefähr ebenso diametral entgegengesetzt wie die Schweiz und Russland. Im Uebrigen wird, was Oesterreich allein anbelangt, aus den mannigfachen Aeusserungen von Abgeordneten und von Zeitungen über innerpolitische Fragen, aus verschiedenen gelegentlich umlaufenden Gerüchten, wie deren ja bei jedem Anlass die entgegengesetztesten im Volke ver-

breitet werden, aus geringfügigen Vorfällen aller Art usw. fast immer gerade nur dasjenige herausgesucht, was darzutun scheint, dass die kleineren und zum Teil kulturell noch sehr wenig entwickelten nichtdeutschen Nationalitäten in Oesterreich gegenüber den relativ etwas zahlreicheren und höherkultivierten Deutschen zurückgesetzt seien. Männer wie MASSARYK haben dann noch wärhend des Krieges in demselben Sinn Propaganda gemacht. So ist aus zehn Prozent der Tatsachen — von den absichtlichen Unwahrheiten ganz abgesehen — ein ganz falsches Bild entworfen worden, neunzig Prozent der massgebenden Tatsachen sind der Welt unbekannt. Es ist so ähnlich, wie wenn beispielsweise in Deutschland und Oesterreich, so oft hier über die Vereinigten Staaten geschrieben würde, immer nur von der Rückständigkeit der dortigen Arbeiterschutzgezetzgebung die Rede wäre und daraus deduziert würde, dass man drüben in allem viel reaktionärer sei als bei uns.

Demgegenüber gibt es nur eines: die *Tatsachen.* Wer über die Verwirklichung des Nationalitätenschutzes in grossen Staaten reden will, der studiere zuerst das Sprachenrecht Oesterreichs, die Praxis der Gerichte und der staatlichen und autonomen Verwaltungsbehörden dieses Landes über diese Materie, die Bestrebungen in der neueren Verfassungsgeschichte Oesterreichs, welche auf die Verwirklichung einer vollständigen Gleichheit der Nationen abzielen, die Schwierigkeiten, welche sich entgegenstellen, die reiche, historische, juristische und administrativ-technisch Literatur (von der politischen gar nicht zu reden), welche über alle diese Gegenstände in Oesterreich besteht.

Es würde viel zu weit führen, wenn ich versuchen wollte, das österreichische Nationalitäten- und Sprachenrecht und seine Geschichte oder gar alle politischen Bestrebungen, alle Gesetzentwürfe und Resolutionen der einzelnen politischen Parteien usw. auf diesem Gebiete auch nur in der gedrängtesten Kürze hier zu erörtern. Das Folgende kann vielmehr nur einige Bemerkungen zur vorläufigen Orientierung des Lesers enthalten. Im Uebrigen muss auf die Literatur verwiesen werden, von welcher hier einige neuere Erscheinungen genannt seien:

MISCHLER-ULBRICH, Oesterreichisches Staatswörterbuch, 2. Auflage, Wien, 1905 ff, und zwar hauptsächlich die Aufsätze „Böhmen" von ULBRICH (I. Band, S. 530—611), „Geschäftssprache der Behörden von SCHAFFGOTSCH (II, S. 371—387) und „Nationalitäten" von FISCHEL (III, S. 676—702). Am Schlusse dieser Aufsätze befinden sich sehr ausführliche Literaturangaben.

BERNATZIK, Die österreichischen Verfassungsgesetze, 2. Auflage, Wien, 1911, S. 879—1016.

BERNATZIK, über nationale Matriken (Rektoratsrede 1910), Wien 1910. Daselbst in den Anmerkungen (S. 95—108) weitere Literaturangaben.

HERNRITT, Nationalität und Recht, Wien 1899.

SPRINGER, (Pseudonym für RENNER) Der Kampf der österreichischen Nationen um den Staat, Leipzig und Wien 1902.

RENNER, Grundlagen und Entwicklungsziele der österreichisch-ungarischen Monarchie, Wien und Leipzig, 1906.

RENNER, Oesterreichs Erneuerung, Wien, 1916.

OTTO BAUER, Die Nationalitätenfrage und die Sozialdemokratie, Wien, 1907.

„LAENDERAUTONOMIE", Sonderheft der Oesterreichischen Zeitschrift für öffentliches Recht, Wien, 1916.

LAUN, Das freie Ermessen und seine Grenzen, Wien und Leipzig, 1910, S. 191—195.

FISCHEL, Das österreichische Sprachenrecht, 2. Auflage, Brünn, 1910.

FISCHEL, Materialien zur Sprachenfrage in Oesterreich, Brünn, 1902.

Auch die Arbeiten der 1915 aufgelösten „K.k. Kommission zur Förderung der Verwaltungsreform", veröffentlicht in der K.k. Hof- und Staatsdruckerei in Wien, enthalten einige Entwürfe und verschiedenes Material, welches hier von Interesse ist.

Es ist übrigens nicht bloss in deutscher Sprache, sondern zum Teil auch in anderen Sprachen Oesterreichs, insbesondere in der tschechischen, eine reichhaltige und vorzügliche Literatur vorhanden. Zitate sind in den früher angegebenen Werken zu finden.

Die Grundlage des österreichischen Nationalitäten- und Sprachenrechtes bildet Artikel XIX des österreichischen Staatsgrundgesetzes über die allgemeinen Rechte der Staatsbürger vom 21. Dezember 1867, Reichsgesetzblatt Nr. 142. Dieser sagt:

„Alle Volksstämme des Staates sind gleichberechtigt, und jeder Volksstamm hat ein unverletzliches Recht auf Wahrung und Pflege seiner Nationalität und Sprache.

Die Gleichberechtigung aller landesüblichen Spra-

chen in Schule, Amt und öffentlichem Leben wird vom Staate anerkannt.

In den Ländern, in welchem mehrere Volksstämme wohnen, sollen die öffentlichen Unterrichtsanstalten derart eingerichtet sein, dass ohne Anwendung eines Zwanges zur Erlernung einer zweiten Landessprache jeder dieser Volksstämme die erforderlichen Mittel zur Ausbildung in seiner Sprache erhält."

In diesem Artikel der österreichischen Verfassung, so anfechtbar auch seine juristisch-technische Formulierung ist und so viel auch in Einzelheiten, zum Beispiel über den Zwang zur Erlernung einer zweiten Landessprache, einzuwenden sein mag, ist im Prinzip ein geradezu ideales Recht der nationalen Freiheit und Gleichheit kodifiziert. Dennoch ist er geltendes Recht in einem grossen Staate. Er kann daher gewissermassen als ein Maximalprogramm für nationale Minoritäten dem Artikel II unseres Minimalprogramms gegenübergestellt werden.

Aber jener Artikel XIX ist nicht etwa nur ein *Programm,* sondern er ist in zahlreichen Gesetzen und Verordnungen durchgeführt und wird *praktisch gehandhabt.* Im Abgeordnetenhaus sind alle Nationalitäten auf Grund des allgemeinen gleichen Wahlrechtes im Wesentlichen proportional vertreten. Alle Sprachen des Reiches dürfen hier gesprochen werden, jede Nation hat im Präsidium einen Sitz; die Gesetze und Verordnungen erscheinen in allen Sprachen. Die Behörden hören nicht nur jeden in seiner Muttersprache, sie erledigen auch seine Angelegenheit in dieser Sprache, beides im Allgemeinen unter der Vor-

aussetzung, dass diese Sprache in dem Amtssprengel der Behörde „landesüblich" ist. Die unteren und zumeist auch die mittleren Behörden werden, der Zahl nach, im Allgemeinen ungefähr proportional aus den Angehörigen aller Nationalitäten ihres Bezirkes zusammengesetzt, unter den leitenden und höheren politischen Beamten überwiegt ein Berufsbeamtentum, das zwar deutsch spricht, aber nach alter und strenger Tradition in allen nationalen Fragen peinlichste Neutralität und Parteilosigkeit bewahrt, übrigens aus allen Nationalitäten Zuflüsse erhält. In der Besetzung der zentralen Aemter, auch der Ministerposten, sind teils *alle* Nationen, teils die grösseren vertreten. Eine qualitativ ungeheuer weitgehende Autonomie der Länder und der Gemeinden bis herab zum kleinsten Dorf legt den Schwerpunkt der Lokalverwaltung und vieler höherer Verwaltungszweige in republikanischer Weise vollkommen in die Hände der jeweiligen nationalen Mehrheit, ohne den Staatsbehörden einen sachlichen Einfluss zu gewähren. Jeder Staatsbürger kann wegen Verletzung des Artikels XIX seine Beschwerde bis vor den obersten, aus Vertretern aller Nationalitäten zusammengesetzten Verfassungsgerichtshof Oesterreichs, das „*Reichsgericht*" bringen. Auch das oberste Verwaltungsgericht, der „*Verwaltungsgerichtshof*" kommt in die Lage, die Einhaltung von verschiedenen Vorschriften des Nationalitätenrechtes durch die Behörden zu überwachen. Die Praxis dieser beiden Gerichtshöfe, ebenso wie jene der ordentlichen Gerichte und der staatlichen und autonomen Verwaltungsbehörden gibt ein *wahres* Bild von der

Freiheit und Gleichheit der Nationalitäten Oesterreichs.

Allerdings kann die Gleichheit nicht *vollkommen* verwirklicht werden, wie dies, wenigstens annähernd, vielleicht eben nur in der Schweiz möglich ist. Vor allem ist es nicht durchführbar, dass die Zentralstellen, die Ministerien, in 8 Sprachen amtieren. Hier hat daher die Macht der Tatsachen ein faktisches Uebergewicht der ehemaligen deutschen Amtssprache erhalten und die anderssprachigen Akten werden, wenn sie an die oberste Instanz gelangen, in der Regel durch besondere Translatoren ins Deutsche übersetzt. Auch das Heer kann ohne eine einheitliche Dienstsprache kaum zweckentsprechend organisiert und geleitet werden. Daher ist für den Amtsverkehr der militärischen Stellen die deutsche Sprache vorgeschrieben und von den Offizieren und höheren Unteroffizieren wird im Allgemeinen das zum Dienstgebrauch genügende Minimum an Kenntnis der deutschen Sprache gefordert. Dies hat ein Ueberwiegen der Deutschen unter den Berufsoffizieren zur Folge, doch herrscht auch im Offizierskorps kraft alter und strenger Tradition vollkommenste Parteilosigkeit und Neutralität in nationalen Dingen. Endlich fordert auch der Verkehr, zum Beispiel im Eisenbahn-, Post- und Telegraphenwesen, eine einheitliche Sprache, sobald er über den lokalen Bereich eines Sprachgebietes hinausgreift. Demzufolge hat auch hier die deutsche Sprache ein teils durch Vorschriften begründetes, teils nur faktisch bestehendes Uebergewicht.

Damit ist aber auch schon alles erschöpft, was als

Zeichen der „Unterdrückung" der nichtdeutschen Nationalitäten Oesterreichs angeführt werden kann. Es ist gewissermassen einen Minimum von nationaler Ungleichheit, das unvermeidlich ist, wenn die Nationalitäten weder einer mit Rücksicht auf die tatsächlichen Sprachgrenzen und Sprachinseln fast unrealisierbaren, jedenfalls aber ohnmächtigen, konfliktsreichen und wirtschaftlich verderblichen Kleinstaaterei noch der viel unduldsameren Vorherrschaft der russischen Staatssprache verfallen wollen.

In allen übrigen Angelegenheiten herrscht nicht nur eine vollkommene Freiheit und Gleichheit des Individuums in nationaler Hinsicht, sondern auch im Wesentlichen eine ungefähr der Kulturstufe jedes Volksstammes proportionale, vielfach aber gewissermassen arithmetische Gleichheit in der kulturellen Pflege und Förderung aller österreichischen Sprachen und Nationalitäten. Jeder Band der „Sammlung der nach gepflogener mündlicher Verhandlung geschöpften Erkenntnisse des Reichsgerichtes", herausgegeben von HYE, und von „BUDWINSKI's Sammlung der Erkenntnisse des k.k. Verwaltungsgerichtshofes" enthält Proben hievon, ebenso die Einzelheiten der vielen Verordnungen, mit denen das Sprachen- und Nationalitätenrecht in den einzelnen Verwaltungsressorts durchgeführt worden ist. Es sei hier diesbezüglich auf die Sammlungen dieser Vorschriften in den schon zitierten Werken von ALFRED FISCHEL, Das österreichische Sprachenrecht, Brünn, 1910 und Materialien zur Sprachenfrage in Oesterreich, Brünn 1902 hingewiesen.

Der Ausländer, welcher Oesterreich nur aus den Büchern von WATSON oder aus den Vorträgen von MASSARYK kennt, würde sich gar sehr wundern, wenn er einmal auf Grund dieser Materialien erfahren würde, welches denn die nationalen Beschwerden und Reibungen sind, die in der Praxis am häufigsten vorkommen. Da erachtet sich beispielsweise ein Deutscher oder ein Tscheche dadurch in seinem nationalen Rechte verletzt, dass auf einem Bahnhof oder Postamt die Aufschriften an *erster* Stelle in tschechischer beziehungsweise deutscher Sprache und erst an zweiter in seiner Muttersprache angebracht sind. Einem deutschen Hausbesitzer in einer rein tschechischen Stadt oder umgekehrt wird von der Gemeinde verwehrt, an seinem Hause neben der Strassentafel in der Gemeindesprache auch noch eine Strassentafel in seiner Muttersprache anzubringen. Ein Advokat, der beider Landessprachen vollkommen mächtig ist, wünscht vor einem deutschen Gericht in rein deutschem Gebiet tschechisch oder vor einem tschechischen Gericht in rein tschechischem Gebiet deutsch zu plaidieren u.dgl. Analoge Konfliktsfälle wiederholen sich zwischen Südslaven und Italienern im Süden, zwischen Polen und Ruthenen im Nordosten usw.

Diese Bemerkungen bezwecken nicht, die hohe Idealität des Strebens nach nationaler Freiheit und Gleichheit ins Lächerliche ziehen zu wollen. Jeder demokratisch Denkende muss dieses Streben mit seiner vollsten Sympathie begleiten. Beispielsweise habe ich in dem schon zitierten Gutachten in dem Sonder-

heft „Länderautonomie" der Oesterreichischen Zeitschrift für öffentliches Recht, Vorschläge zu formulieren versucht, wie die Bestrebungen der österreichischen Nationalitäten nach staatsrechtlicher Selbständigkeit im Rahmen eines Bundesstaates für *alle* Nationalitäten praktisch verwirklicht werden könnten, ohne dass die wirtschaftliche und militärische Kraft der Gesamtheit untergraben und künftigen russischen Eroberungen preisgegeben würde. Allein die Beispiele von nationalen „Streitfragen", die ich eben angeführt habe, sind nicht etwa extreme, ad hoc von mir ausgesuchte Fälle, sondern sie sind *typische, alltägliche* Beispiele aus der Praxis des sogenannten österreichischen Sprachenstreites. Freilich sind sie nur *Symptome,* hinter ihnen steckt etwas Tieferes. Aber gerade dieses ist es, was für jede Behandlung des Nationalitätenproblems und daher auch für die Erörterungen über Art. II unseres Mindestprogramms so ungemein lehrreich ist: *Die Reibungsflächen ergeben sich nicht aus dem Fehlen demokratischer Freiheit und Gleichheit in Bezug auf das Nationalitäten- und Sprachenrecht, sondern aus undemokratisch-nationalen Eroberungstendenzen, aus der Sucht, unter dem Vorwand der Freiheit und Gleichheit das eigene Volkstum auf Kosten des fremden auszubreiten.* Dies ist namentlich in der sozialdemokratischen Literatur, wie sie uns etwa in den Werken von RENNER, OTTO BAUER, in der Zeitschrift „Der Kampf" und in der „Arbeiterzeitung" entgegentritt, oft genug dargetan worden.

Das österreichische Nationalitätenproblem dreht sich hauptsächlich um zwei Punkte: In Böhmen, wo neben

4 Millionen Tschechen 2½ Millionen Deutsche, überwiegend in scharf von einander abgegrenzten Sprachgebieten getrennt, wohnen, wollen vielfach die Tschechen, die vermöge ihrer Majorität die stärkeren sind, das deutsche Sprachgebiet national „erobern", während die Deutschen im Wesentlichen eine Trennung des Landes nach den Sprachgrenzen anstreben, um der „Tschechisierung" zu entgehen. In Galizien stehen in ähnlicher Weise 4½ Millionen Polen 3 Millionen Ruthenen gegenüber. Auch hier strebt die Minderheit eine Trennung des Landes an, um der polnischen Vorherrschaft und nationalen „Eroberung" zu entgehen Freilich sind hier diese Bestrebungen einerseits durch die sehr niedrige Kulturstufe des grössten Teiles des ruthenischen Volkes, andererseits dadurch sehr erschwert, dass hier keine scharfe Sprachgrenze vorhanden ist; endlich sind die Ruthenen durch besondere Wahlrechtseinrichtungen für Galizien in Nachteil gegenüber den Polen gesetzt. Im Vergleich zu diesen nationalen Eroberungstendenzen der Tschechen und Polen ist der Süden in Oesterreich — wohl zu unterscheiden von Ungarn und Bosnien — von viel geringerer Bedeutung. Hier stehen die Süd-Slaven teils den Italienern, teils den Deutschen gegenüber, teils sind sie im nationalen „Eroberungskrieg" die Angreifer, teils die Angegriffenen.

Im fernen Ausland nun haben diese verschiedenen Bestrebungen nach nationaler Eroberung, da sie nur auf Grund des Artikels XIX und der ungeheuer weitgehenden Autonomie der österreichischen Länder und Gemeinden möglich und verständlich sind, zumeist

eine ganz falsche Beurteilung gefunden. Man glaubte durch jene, früher erwähnte Literatur einseitig und unvollständig, wenn nicht unrichtig, unterrichtet, dass ähnlich wie in Russland oder Ungarn, *ein* Volk die Vorherrschaft ausübe, nämlich das deutsche, und dass ein alternder Obrigkeitsstaat vergebens bemüht sei, die Privilegien des herrschenden deutschen Volkes gegen den demokratischen Freiheitsdrang jung aufstrebender Völker zu behaupten. Das Gegenteil ist der Fall. Für ein *demokratisches* Nebeneinanderleben *gleicher* Völker in nationaler Beziehung, ist das österreichische Staatsgebäude im Wesentlichen längst eingerichtet, nur Probleme zweiten oder dritten Ranges bleiben da noch zu lösen. Was den sogenannten Nationalitätenstreit vor dem Kriege nicht zur Ruhe kommen liess, war vielmehr jener, wenn man so sagen darf, undemokratische nationale „*Imperialismus*", jene *Eroberungs*bestrebungen, die bei den nationalistischen und reaktionären Parteien *aller* Völker Oesterreichs in Erscheinung treten. Demokratie und Freiheit, Fortschritt und Zukunft müssen daher auf die Seite des national unparteiischen österreichischen Staates mit seinem jungen, noch äusserst entwicklungsfähigen Sprachenrechte treten, *gegen* die Bestrebungen jener Nationalisten aus aller Welt, welche Oesterreich um der imperialistisch verstandenen Nationalitätsidee Willen unter den imperialistischen Nachbarvölkern aufgeteilt wissen wollen. Nicht England oder Frankreich, Deutschland oder Russland, Japan oder die Vereinigten Staaten sind ein geeignetes Vorbild für den uns in nebelhafter Ferne

vorschwebenden (zukünftigen) Weltstaat in Beziehung auf das Recht der Nationalitäten und Sprachen, sondern *Oesterreich*. Wie immer man sonst über die Verfassung dieses Staates denken mag — ich selbst halte sie für äusserst reformbedürftig — in *dieser* Hinsicht muss er von jedem demokratisch Denkenden hoch über alle grossen Kulturstaaten der Welt gestellt werden.

Nicht als ob Oesterreichs eigentümliche Einrichtungen ohne weiteres auf jeden Staat übertragbar wären. Im Gegenteil, sie bedürfen sicherlich in jedem einzelnen Fall noch vieler praktisch sehr wichtiger Aenderungen, um auf die besonderen Verhältnisse irgend eines anderen Staates anwendbar zu sein. Aber ich meine, wenn wir solche Fragen, wie die früher zitierten Fragen 2 und 3 des Programms der II. Kommission überhaupt aufwerfen, so müssen wir den nationalen Minoritäten aller Staaten für ihre politischen Programme und den Staaten selbst für ihre zu hoffenden künftigen Reformen kein Flickwerk, sondern gewissermassen ein Vorbild aus einem Guss, beruhend auf grossen Prinzipien, zugleich aber doch ein *praktisch erreichbares* und *in der Wirklichkeit bewährtes* Vorbild zeigen. Ein solches Vorbild nun, das für Grosstaaten in Betracht käme, scheint mir nur das Sprachen- und Nationalitätenrecht Oesterreichs zu gewähren.

IV. DÉVELOPPEMENT DE LA CONFÉRENCE DE LA HAYE

THE WAY OUT

BY

DR. S. VAN HOUTEN, HOLLAND.

PREFACE.

The way out of the present hell can only be found by the cooperation of three political and social powers, n.l.

a. *The electors*, when they return to or accept the principles of the Cobden Club: *Peace, Free trade, Goodwill among nations;*

b. *The elected*, when they continue the work, inaugurated by Passy and Randal Cremer and organised in the Interparliamentary Union, and

c. *The governments*, when they continue the work inaugurated by the Russian Czar and organised in the Peace-Conferences.

The short essays, published in this paper show the next moves on the lines *b* and *c*. Their origin lies in a mandate of the Interparliamentary Union to a Commission for the preparation of the third Peace-Conference, consisting of Beckman, Lammasch, Slayden and myself, while the fifth member Kovalevsky died. As the war made the continuation of our collegial work impossible I continued it by myself alone and extended the mandate as will be seen in the reprinted essays. Evidently a lasting peace cannot be reached by mili-

tary successes. They would be got by combinations of forces, which have no guarantees of being permanent. The combination, which considering the whole struggle may be the stronger, cannot shut the eyes for the hard facts. Some conflict of interests among themselves may arise and in consequence *each of them would have to defend under quite other circumstances the results, which they owe merely to a powerful but casual cooperation.*

Supposing a durable understanding could be found on the lines indicated in the first essay, I think none of the States, who now sacrifice the best part of their male population and their financial power to an extent, that means for some depopulation and for all unbearable taxation when not bancruptcy, would continue the war for merely military guarantees, valuable only, when peace would mean armistice and preparation for a revanchewar.

Of course it is not my intention, neither favourable to my purpose to critisize, more than is strictly necessary, either of the belligerents, but it is indispensable to make here an objection against the policy of the Entente. Mr. Asquith asserted repeatedly that the result of the war must be a durable understanding between the nations. Nevertheless he never gave even the outlines of that new international situation. Have the belligerents on the side of the Entente some agreement among themselves about it? If so, would it not be of the highest interest for the whole world if its terms were published with the conditions, under which neutrals in the first place and in the second place each of the opposite belligerents are allowed to accede to this agreement,

alliance, league, or whatever name may be in conformity with its terms?

Supposing it does not exist, the question arises, whether the neutrals, America in the first place ought not to convocate a universal conference on the basis of the Peace-Conferences to discuss the international situation after the war. To continue slaughter and destruction in order to reach a permanent international peace, but leaving it a mere mirage and never stating its terms, seems to me irresponsible towards the peoples, of course the belligerents in the first place but also towards the neutrals who suffer less but sufficiently to look eagerly to a remedy.

They may and must leave the conditions of peace to the belligerents themselves, but the coming international situation is a common interest of all.

According to my mandate of the Interparliamentary Union I have tried to state the principal objects of such a Conference and I am glad to say that my essay found the entire approval of my colleague Lammasch. Also the Swedish member Beckman and our Secretary Lange declared their approval in general, though they did not think it opportune to favour its distribution by the Council of the Union to its members. This distribution I now take in hands myself. Of Mr. Slayden's general approval I feel sure, knowing his views and having discussed a large part of the contents in our meeting before the war.

To avoid misunderstanding I want to draw the special attention of my readers to the fact that the measures I propose form two quite distinct groups. To the fist ber-

long: *a:* the organisation of a permanent States-Council advising about international matters and preparing treaties and *b:* the conclusion of a general treaty on the line of the Bryan-Treaties.

To the second group belongs the discussion of the possibility of charging this council with some international administrations, especially of managing an international sea-police and of organising territories, i.e. new States as long as they are in embryonic form.

Only the first group can be the object of convocation of the Conference; extensions of this programme would of course lie in its own hands.

Finally I have to say a few words about the history of the essays themselves. The contents of these with many other matters have been originally published in my Dutch publications and have in this form attracted the attention of foreign journalists. Mr. Teuteberg's notice of them in the *Deutsche Revue* brought me in relation with its leader Mr. Fleischer who admitted my essay without alterations, but to whom I am bound to state here, that this did not mean full assent to every detail. The second essay forms the part which was translated from one of my Staatkundige Brieven (Political letters) in a larger article in the Easter Number of the *New York Tribune* by the American journalist Robert Mountsier, under the title „Why should the Sea have a master". This title I in my turn borrow from him.

No other objection against the contents of the Essays has reached my ear, than that I aim too far; to this I can only reply that if ever, here the proverb is applicable:

Great evils want great remedies.

S. VAN HOUTEN.

THOUGHTS ABOUT STATES-COMMUNITY.

The pre-war international condition in Europe was subject to difficulties, but these troubles were not proportionated to the bloody and costly sacrifices made nowadays to cure them. Passy's and Randal Cremer's idea in 1889 to summon all members of parliament for an endeavour to submit international disputes to arbitration instead of deciding them by force of arms, and to create a permanent court for that purpose, was not only beautiful but also very practical. They met with success. Gradually members of all parliaments in the world founded sections of this Union. The number of members of these sections varied in proportion to local circumstances.[1] In 1912 their number was 3640, but the next year 300 less, most of these not being reelected (Report of the Hague Conference 1913, p. 11).

[1] In a certain sense the spirit of a people is reflected by the numerical strength of membership of the Union. Having attended the London Conference of 1890, two members of the Union and I prepared a Dutch section. The president of the Netherland's Upper House Van Naamen van Eemnes and nearly all its members and the greater majority of the Lower House adhered to the newly formed section. Without any political considerations both the purpose of the Union and the fundamental idea of a society of nations were equally approved by all parties. This may explain too the spirit of the Dutch neutrality nowadays. The Dutch people do not believe that a displacement of power in favour of one of the belligerent parties will benefit the community of nations. They feel inclined, at least since one generation to this peaceful community of nations and they wish it to be reestablished as soon as possible.

The Interparliamentary Union was in a certain sense a daughter of the Peace Societies and in the earlier years the experienced members of parliaments being at the same time members of the Union had always to point out the difference between the Union and the Peace Societies. The purpose of the Union was to further the *organization of nations* in behalf of peace; to establish *a spirit of peace in mankind* belonged to the task of the Peace Societies. Consequently the first meetings were chiefly consecrated to elaborate a scheme of a Court of Arbitration. The Union directed by the Belgian Senator Descamps had finished this task at the very moment the Czar of Russia unexpectedly summoned a Peace Conference (August 24th 1898). The elaborated scheme of the Union was placed without discussion on the order of the day of this Conference and adopted by it.

Since that moment the Union found no new task to consecrate its energies to. Therefore it became identical to a Peace Society, so much the more because the Peace Conferences were especially indicated to formulate the most practical scheme for a society of nations. The greater part of the Union's latter resolutions consequently only express wishes to the Conferences of the Governments.

But some of the resolutions which I will discuss here are relative to those Conferences themselves and to their future development.

Directly after the first Peace Conference wishes have been formulated in Christiania that future Conferences should have to put into practice as fully as possible

the principle of a permanent Court of Arbitration. Later on, especially as result of propositions of the American Senator Bartholdt, the development of the Interparliamentary Union and of the Peace Conferences in the line of an international legislative power or International Parliament was subject of discussion. In London (1906) a report in general favourable to these propositions had been a point of consideration. However the efforts to create such a central legislative power did not meet with universal approval. After discussion the following more narrowly formulated resolution was adopted:

„That it would be advantageous to give the Hague Conferences a more permanent influence in the work of pacification, and that the powers should agree in establishing the periodical meeting of these Conferences. That the Powers, when appointing their representatives to the second Hague Conference, could usefully include in their instructions the duty of endeavouring to find the means of constituting a permanent consultative council entrusted with preparing the codification and development of international law" (Official Report p. 116).

When the preparation of the Third Peace Conference was in sight the Dutch section of the Union pursuited its studies in the above mentioned line and invited me to propose a resolution. This resolution aimed to procure a permanent organ to the Conferences without influencing their character of diplomatic conferences of independent States. A report of mine may be found in the Compte rendu of the Geneva meeting (1912) pp. 131—135. In the discussion I summarized the con-

tents of it in the following speech (pp. 254—255):

"In name of the Dutch section I propose to take a decision about a matter of much importance, viz. the organization of the Peace Conferences of the Governments. My proposition has not yet been worked out fully; it is only expressing a wish to our Council to which your agreement, I think, may be expected in advance.

"When you accept our proposition, our Council will nominate a commission for study, in order that the Hague Conferences may be analogous to the Interparliamentary Conferences. In any case has the necessity of the Peace Conferences' periodicity never been pronounced explicitly, but we need not doubt that public opinion is already regarding them as a permanent institution of international law. The committee for preparation of the Third Peace Conference will in fact tacitly or perhaps even expressly follow the same aim and develop itself to a Permanent Bureau of the Conferences. The facts are predicting it and the logic of events is tending to it.

„Nothwithstanding the aim being very simple and clear, many difficulties arise in connection to the composition of this Committee when putting it into practice. I call only your attention to the questions of number, nomination and competence of its members. The Interparliamentary Union has to use its influence in this matter as already in relation to many other affairs e.g. in behalf of the organization of a Court of Arbitration.

„As I observed in my report, we only intend to deal with a permanent organ of the Peace Conferences as they

have been hitherto, that is to say, Diplomatic Conferences of independent States. In this spirit we should wish the Commission that is to be entrusted with the report, to prepare the constitution of the permanent Committee and the Secretaryship of these conferences. We could not pass beyond the limits of this plan, without sterilising our work before it had been started. The Governments have traced out this limited task for the conferences and as far as I know the wish that it should be extended has never been expressed."

The proposal was adopted without any discussion and the Commission was nominated. It only met once and during this meeting the American delegate, Mr. James L. Slayden and myself, together with our secretary, Mr. Lange, went through the whole matter and considered it, partly with the help of a written answer to the questionary of Prof. Lammasch from Vienna. During the meeting at the Hague (1913) that report was not yet delivered and all further preparations were prevented by the outbreak of the war.

Nevertheless the reader will understand that I went on working at my plan and that I could not get rid of the thought whether it might not be possible to develop the proposed "Permanent Commission for the Preparation of the Peace Conferences" itself into a *permanent advisory body in regard to international matters*, — having a far more extensive task than was originally meant for it of course — whose influence might have a soothing effect on conflicts, arising in the future.

I have published the result of my investigations in my Dutch essays; it has met with a favourable reception in quarters that were acquainted with it in this way. None the less I gladly seize the opportunity to put it before the readers of this review and explain it to them briefly.

I have in view in the first place a College, which only advises and elaborates opinions and projects, but where — excepting resolutions about its own methods of working — no resolutions are voted by majorities. In conformity with these functions the College's name could be *Council of States for international affairs*. This States-Council ought to have a President or Presidential college for its own administration and a Secretary with the necessary assistants, all to be paid by all the participating States in a way, that the most prominent personalities could be found for these offices and permanently live at the seat of the Council in conformity with their high position. Election, term of office, admissibility of reelection etc. could be left to further agreement. Only the Presidency and membership of the presidential college must be absolutely independent from every individual State and therefore a member of the Conference elected as such, must cease to represent his State. To take part in the Conference those Governments are invited who were represented at the Peace-Conferences. These appoint so many members as, within certain limit, they may think convenient, but at their own expense, and in special cases they may give them experts as assistants. If more members are appointed one of them has to be desi-

gnated as first member. The sole, respectively the first representatives have to live at the seat of the council or so near it that the Presidency can convocate a general meeting within a couple of days at the very most. Plenary Conferences for definitive discussion meet as is usual for the Peace-Conferences, as far as material is prepared, also by publication, for final decisions. Here it may be remembered once more, that voting only takes place to give an easy and clear survey of the final instructions of the governments, not to bind minorities. Treaties only become binding by ratification.

In passing it may be remarked that the States-Council and its office may prove themselves also useful in matters, that are only of interest for some States, and simplify the actual ambages of the Chanceries.

To make this standing representative of the Conferences of use as mediator in conflicts, a single paragraph of a treaty would be sufficient, which would be also very useful to guard the peoples against dangerous resolves of military authorities, their own as well as those of others, namely a stipulation, that no State is allowed to commence any action by force whatever against another State or its subjcets, unless the claim be notified to the States-Council at least some weeks before. This extension of its field of action is already prepared by the Interparliamentary Union. At its meet at The Hague of 4 September 1913 the following resolution was adopted unanimously which was proposed by the american group and recommended in

splendid speeches by Bartholdt and Burton (Compte rendu, p. 231—244 and 313—317):

> "Whereas the President and Secretary of State of the United States have invited all the governments signatory to the Hague Convention to enter into treaty agreements with the governments of the United States, by which the High contracting Parties pledge themselves incase of any difference or controversy between them not to resort to hostilities until an impartial investigation has been had; and
>
> "Whereas these agreements would be clearly in the interest of international peace in as much as their adoption would greatly enhance the possibility of a peaceful settlement of all controversies between nations;
>
> "The XVIIIth Interparliamentary Conference herewith heartily recommends to the governments the principle of these agreements.
>
> "The Conference is of opinion that such agreements should form part of the task of the Commission on International Jurisdiction in order to facilitate the general application of the rules of these treaties."

At that moment there lay before the Conference a copy of a treaty between America and San Salvador (Compte rendu p. 313) of which kind at this time already more than twenty are concluded.

The States-Council could act as a permanent Committee of investigation.

In such a clause evidently lies a weapon against the great foe, whom it is difficult to define and still

more to fight with force, n.l. "*Militarism*". Militarism is not military force itself. Otherwise the States, which fight Germany for this evil, would now be subject to it themselves and even be proud of the stupendous development of this evil. The essence of militarism lies in the use of the military forces and in the ascendancy of military considerations in home and foreign policy.

Since there exist also on the field of destruction wonders of technic and organization, technical pride and a natural impulse not always to be contented with drilling and manoeuvres make this state of mind double dangerous.[1]).

But of the horrors of the real use of these wonders the whole world is now fully satiated, and it is I think prepared to limit the use of military forces in conformity with the proposed clause. Anyhow this seems to me indisputable, that warm support in favour of it may be considered as a proof that a State is not subject to militarism or if it has been is now profoundly healed by seeing the horrible consequences.

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[1]) Of the change in the notions about what is allowed or forbidden, just in this XXth Century, in favour of the technical progress the opinion about the throwing from the air of explosives offers a striking example. The first Peace-conference forbade it, it is true only for five years. The air-shipping developed rapidly, so the danger increased. But the airship as destructive engine came in favour at the same time. The second Peace-conference did not renew the prohibition. To promote a new humane regulation was the last work of the great pacifist Beernaert. His excellent report was discussed in the conference of Geneva and an almost unanimous resolution in favour of a renewal of the prohibition was adopted. A small minority whose eloquent representative was the Frenchman d'Estournelles de Constant, voted in favour of unlimited use of the technical wonder (Compte rendu, p. 121—130 and 257—352).

If the States-Council is once well in the saddle, it will surely ride well. It will only be an organ of moral force but are not at the end the moral forces the strongest?

But it is not excluded that once in existence as an impartial representative of the totality of the States, it can be entrusted by separate treaties with administrative functions, and that it will get control of the necessary forces to perform them well. I have specially in view two objects of administration *in spe.* Primo territories separated via facti from their own country and destined to become independent States. They are like the American territories and have to be educated to full independence. Who would be better entitled to their supervision than the States-Council, when it existed? And secondly the sea presents itself as an object of administration with a certain natural necessity and by force of actual circumstances.

The sea belongs only to the individual States as far as the territorial waters reach; for the rest it is *res nullius*, by its nature destined for common use for transport, fishing and amusement. Naturally it has also been used for other than peaceful objects. In the course of times it has also seen piracy, limitations of trafic and battles. The battleship became a means of power to rival States. The law of nations has tried to put order on this matter in war and peace and to limit the use of warships. The Interparliamentary Union has done its best to extend these limitations further in the direction of *a.* entire inviolability of private property at sea; *b.* limitation of the right of blockade; *c.* limitation of the qualification of contraband to objects

really destined to be used in war; *d.* limitation of the destruction of ships with contraband as cargo. I can refer here to the reports of the conferences of Bern (1892) the Hague (1894), Christiania (1899), and especially of London (1905) and Brussels (1910).

In the present war all what was considered as law with all projects of reform is overthrown, in a way that it literally does not exist anymore. For the qualification as contraband the leading principle has been wholly abandoned, that war is not a struggle between the peoples themselves but between their military organisations and that consequently only what serves these in their work is means of war and therefore contraband. The notions of blockade and siege are extended so far, that *de facto* whole neutral states are included in the blockaded or besieged territories. The rights of the neutrals and the mail-service are restricted just as pleases the strongest sea-power. Only the casual constellation between the powers is cause of all these proceedings. It would be, I think, highly unprobable, that France, Russia, Italy and Japan should admit as law against themselves in future what England now practises. Provisionally however law at sea is what pleases England.

Then there is the new battleship, the submarine, to overthrow the actual balance of maritime power. Not yet at this moment; but one ought to consider what situation will arise when the whole world will swarm with these implements of war which are relatively not expensive. England may extend its rights in a wholly unlimited way with regard to their relations

with the now weaker States; but when once all waters will be full of submarines, real use of power, a real *rule the waves* will be impossible. The Englishman who doubts it may suppose for example all islands and creeks of the Mediterranean crowded with submarines!

International administration of the sea is the only means to restore a situation favourable to the peaceful work of the nations. It is indispensable to go back to the fundamental principle, that the sea as *res nullius* has to be brought under international rule and police, of course with provisions for States, of which the different parts are separated by the sea. It is the only way out of the present hell and the only escape from its increasing horrors.

Special attention should be given here to straits and canals between seas. The member of the German Diet Pachnike has introduced this matter in the Interparliamentary Union, and the Portuguese member de Penha Garcia has elaborated an excellent report on this subject. (Compte rendu of the conference at the Hague of 1913, p. 51—105 and 175—193). The necessity of extending the new regulations also to these straits and canals is evident when attention is fixed f. e. on the situation of Russia, which through the Bosporus and the Dardanelles can reach the Mediterranian but is then, just as the adjacent powers themselves locked up behind a canal, made by man on one side and a strait under the control of England on the other.

Of course everybody will ask at once: But England? My answer is: try! Why could not England be contented with a leading position in the international

police? As its worldpower is composed, it cannot allow any other power to get the stronger at sea; in this claim to superiority England is right. But to attain without sacrifices and struggles the same guarantees for its interests must be acknowledged as the better way, not only by the disciples of Cobden and Bright, but also surely by the taxpayer, who in England will find the screw without end as it will prove to be in the future, as hideous as in other countries.

It will be a real relief for the whole world, not to have to pay any more for fleets and to limit its expenses to what is wanted by a moderate contribution for the sea-police. Only the taxpayer may not be too close in order not to engender, I fear a too big foe. He may be generous with pensions!

The author submits this sketch of a new order of things to the approval of the nations. It is drawn in conformity with the principles of the historical school. It joins directly to the outcome of history and the projects of reform prepared by thousands of members of parliaments. This order of things once existing, one would scarcely feel any change, while in reality this great change would have been made, that a new and powerful organ of moral and legal considerations would have changed the balance of power in favour of such considerations in a degree that a durable peace, when of course not absolutely guaranteed, would become highly probable.

WHY MUST THE SEA HAVE A MASTER?

As long as war at sea was limited to efforts to damage their respective men-of-war and to make profit by seizing merchant ships, the acknowledgment of the inviolability of private property at sea seemed sufficient as the keystone of the efforts of the pacifist movement. If it brought no profit England's interest in supremacy at sea would diminish, and if no damage were feared for tradesmen from the other side acquiescence in England's majority would be possible.

This war has shown that England's majority is dangerous in another way. Till the present war England claimed to want a paramount war-fleet only in order not to be exposed to the danger of being unable to secure sufficient food in time of war. That any great Continental country could be starved may have been thought theoretically possible; practically it was not feared. Otherwise Germany could have easily made herself a storehouse of food, which would have prevented England's starving project. Every one who wishes that the coming peace may stop the causes of war has to take into account this new use of England's majority. By the acknowledgment of the inviolability of private property at sea alone could not be made impossible for the future that England, by its enlarged

definition of contraband, should continue to have the power to cut off the food supply of every country with insufficient production of its own.

At the same time the assault of he Allies upon the Dardanelles brings to the front the question of the power over straits and maritime canals. Russia tries at once openly to get the possession of these straits and wishes the Allies to put in her hands this key to the Black Sea, also the key to the Danube. The opening of the dispute over the Dardanelles, of course, draws the attention to other questions of the same sort. At once it appears that Russia can scarcely be contented in the future by the possession of the Dardanelles; she wishes access to *the* sea, but she comes through the Dardanelles to only *one* sea, the Mediterranean, whose two keys, Gibraltar and the Suez Canal, are in the hands of England. Looking at this matter from another aspect, not only Austria and Turkey, but also Italy, Greece and the Mediterranean parts of France and Spain must feel the more how impotent they are against England if ever she uses to the extreme the power which this situation confers.

Germany continues the present war effectively with submarines, of which she has a majority, and Germany claims in an officious publication that she wages this war not only for herself, but on behalf of all weaker seafaring nations! This expression from German authorities as to their intentions may contain some comfort for the weaker powers, but there is also the possibility

that the creation of a German fleet, greater than England's, would only result in her succeeding the English as masters of the sea. If such should prove to be the case the weaker States would gain nothing. It must be acknowledged that the use England has made of her power in the last century, taken as a whole, has been such that, supposing one of the great powers has to be master of the sea, England would be chosen; certainly in preference to Germany.

But with the other nations, the United States included, the first question remains, nevertheless: is it necessary that the sea belong practically to one power, and has there to be one master? They naturally answer this question in the negative. As a basic principle of international law, the sea belongs only to the adjacent states as regards the so-called territorial water; for the rest it is *Res nullius*, free for all. Nobody is entitled to be master there, or to play there the master. The sea is open for all to navigate and to fish in, and conflicts while using the sea for these ends must be prevented by a common sea-police.

The origin of all trouble at sea is the war-fleets themselves, their mutual rivalry, their taking and destroying of the merchant ships of others, finally the measures they arrogate to themselves against the neutral ships.

A permanent world peace requires obviously more incisive measures than those which have been advocated by the Interparliamentary Union. This worldwide peace, to be lasting, can best be brought about by the

acknowledgment and application of the three following principles:

1. That the sea is free, belonging to no nation.

2. That the sea is only for the common use of all peoples for peaceful purposes.

3. That this use and the use of straits and maritime canals as means of access to it be secured upon an equal footing for every nation by an international sea-police.

An international fleet would bring to an end the necessity of coast defence, for attacks from the sea side would be impossible, and the transport of military forces would be as far as needed under the control of the international sea-police. It would liberate the powers who compete for the majority at sea from a burden which is already heavy and threatens to get unbearable if continued in the present way.

The international sea-police would also liberate them from a moral burden. Even more than the war on land the present sea-war renders men inhuman. Think out in its details the possibility of their starving women, children and aged men, forcing the German soldiers to lay down their arms, to deliver their fleet and to become themselves unarmed helots of French and Russian rulers. These inhuman demands render inhuman those to whom they are made. Every Englander who condemns, and rightly condemns, the present action of the submarines may keep in mind that this form of war is an answer to his own unjust and arbitrary definition of food not destined directly for armed forces as contraband. Unless there are made new gene-

ral rules, as indicated heretofore, all States will have to compete *bon gré mal gré* for superiority up and under the sea. For none of them is this an attractive task.

Has an international regulation providing for this police-fleet a chance to be accepted? I answer with a counter-question: Why not, if it is good and relieves all peoples of a heavy burden?

But will England give up her supremacy on the sea by free assent? This question England will have to answer herself. Those who support a new organization which leaves England equal rights with all others are not bound to give up their plans because England may possibly oppose them. England is equally oppressed by the costs of her mighty position, and this position would become much more difficult if she opposed a new organization against the unanimous wish of all others.

And the free co-operation of England—why would not that be possible? England varies also in her international policy. It has followed a line which for England has been reactionary. The policy which became paramount with the abolition of Cromwell's mercantile laws and of the corn duties, commonly called that of Cobden and Bright, has temporarily lost its ascendancy by the treason of Chamberlain. By 1906 it was restored to power. The formation of the Campbell-Bannerman ministry was a change of play as well as of players. English public opinion in the party that secured control of its government was anti-military. She wished reduction of the costs of the navy and friendly relations with other countries. Unhappily she was from

the beginning hindered in her policy by the naval policy of Germany, which though it did not build more than two-thirds of the number of warships constructed by England, ignored the fact that the party in power in England built her three-thirds not of her own free will, but only to maintain this proportion against Germany.

Under the influence of these circumstances the cosmopolitan and pacific party in the ministry weakened, and the national egotistical spirit, represented by the House of Lords and the Unionist party, became ascendant. So it came that war was seized as a means to destroy the imminent competition for the mastery of the sea.

Nevertheless, nobody can say what England will do should Germany, Russia and other nations adopt in principle that freedom of the sea without any other navy than an international police-fleet. It would surely be accepted as an abandonment by Germany of the important expression of its "militarism", because of which the official English press says the war was begun.

The immense extension of the present war, the inhumanity of the ways of waging war and the still more atrocious situation which will arise if all peoples continue in rivalry to make technical processes subservient to mutual destruction, require from the friends of peaceful negotiation and the co-operation of the peoples equally drastic means of common action.

It gets more and more clear for all that the matter is no more some small displacement of power, but the continuation or ruin of our entire civilization.

V. COUR D'ARBITRAGE; COUR PERMANENTE DE JUSTICE INTERNATIONALE; CONSEIL INTERNATIONAL D'ENQUÊTE ET DE CONCILIATION

APOLOGETISCHE UND KRITISCHE BEMERKUNGEN ZU DEM VON DEM NIEDERLAENDISCHEN COMITE AUSGEARBEITETEN ENTWURF EINES ALLGEMEINEN VERTRAGES UEBER DIE FRIEDLICHE REGELUNG INTERNATIONALER KONFLIKTE

VON

PROF. DR. HEINRICH LAMMASCH, OESTERREICH.

Das Ziel, das der Entwurf sich steckt, ist es, für jede Art internationaler Differenzen Mittel zu ihrer friedlichen Schlichtung zu finden. Dieses Ziel ist ein so erhabenes aber auch so schwieriges dasz es mir als die Pflicht eines jeden scheint, der sich theoretisch oder praktisch mit solchen Fragen beschäftiget hat, zur Ausgestaltung des Entwurfes und zu dessen Verwirklichung mitzuarbeiten.

Die Verfasser des Entwurfes gehen von der Erkenntnis aus, dasz man von den Staaten nicht die Unterwerfung aller Streitigkeiten unter ein Schiedsgericht verlangen könne. Darum schlagen sie Schiedsgerichte nur für eine bestimmte Gruppe von Differenzen vor, während sie für alle anderen, und darunter gewisz für die schwersten Fälle von Konflikten, eine andere Art ihrer Beilegung beantragen. Diese soll nicht unter allen Umständen zu einer die Parteien verpflichtenden Austragung des Streites führen, sie soll den Staaten den Weg zur Selbsthilfe für die alleräussersten Fälle nicht ganz versperren. Durch diese Konzession hoffen

die Verfasser des Entwurfes die Zustimmung der Staaten leichter zu gewinnen. Der Krieg soll nicht unmöglich, wohl aber möglichst unwahrscheinlich gemacht werden.

Die Art, wie der Entwurf die arbitrablen Fälle von jenen scheidet, für die der Weg des Ausgleiches der entsprechendere ist, bedeutet einen groszen Fortschritt gegenüber der bisher üblichen Umgrenzung der vor Schiedsgerichte gehörenden Fälle. Der Entwurf weist nämlich ebenso wie der von Lord Bryce und Dickinson dem Schiedsgerichte nicht nur die Streitigkeiten über die Auslegung eines zwischen den Parteien geschlossenen Staatsvertrages zu, sondern auch solche über Auslegung irgend einer Regel des zwischen ihnen geltenden *un*geschriebenen Völkerrechts und unterstellt zweitens dem Schiedsgerichte auch noch die Frage der Entschädigung wegen Verletzung von Normen des geschriebenen oder ungeschriebenen Völkerrechts. (Art. 16).

(Redaktionell würde es sich vielleicht empfehlen diese beiden Kategorien schärfer auseinander zu halten. Auch scheint mir die Fiktion, die der letzte Satz des zweiten Absatzes ausspricht, entbehrlich und, wie jede Fiktion, eher nachteilig. Ich würde vorziehen, den ersten Satz des zweiten Absatzes als alinea 3 den beiden vorhergehenden Sätzen anzuschlieszen).

Ebenso bin ich damit einverstanden, dasz zur schiedsgerichtlichen Entscheidung im allgemeinen, ein Kompromiss der Parteien vorausgesetzt, dasz aber unter Umständen dieses Kompromiss durch ein, auf Verlangen nur einer Partei ergehendes Einlassungsdekret des Schiedsgerichtshofes (das sogenannte Qua-

sikompromiss), ersetzt werden kann. (Art. 18). Auch die Bedingungen, unter denen dieses Quasikompromiss von der cour abgeschlossen werden kann, scheinen mir im Vergleiche mit Art. 53 der Friedensakte 1907 zweckmäsziger formuliert.

Ernste Bedenken jedoch habe ich gegen die Zusammensetzung der Organe des Schiedsgerichtes und gegen die von Art. 48 zugelassene Appellation.

Nach dem Entwurfe entscheidet der Schiedsgerichtshof entweder als Plenum (cour), oder als Kommission, oder als bureau présidentiel.

Das Plenum entscheidet ins besondere über Feststellung des Quasikompromisses (Art. 17, 18 u. 19, womit jedoch Art. 26 nicht übereinstimmt, was doch wohl gegenüber Art. 17 bis 19 ein Redaktionsversehen ist. Oder sollte der Ausdruck „cour" in Art. 17 bis 19 in dem Sinne gemeint sein, wie in Art. 16?). Meines Erachtens ist es richtig, für das Verlangen nach einem Quasikompromiss und die Entscheidung darüber noch grössere Garantien zu fordern als für die Entscheidung in der Hauptsache. Denn die Aufstellung eines Quasikompromisses erfolgt gegen den Willen der einen Partei; sie legt ihr die Pflicht auf, sich gegen ihren Willen in das Verfahren einzulassen. Dadurch begründet sie einen schwereren Eingriff in die Souverainität der Partei als die Entscheidung in der Hauptsache, die in einem Verfahren ergeht, in das die Partei sich freiwillig eingelassen hat, oder in das sich einzulassen, sie eben schon durch den früheren Spruch verpflichtet worden war.

Die Aufrichtung des Quasikompromisses ist die ein-

zige, eigentlich richterliche Aufgabe, die dem Plenum zugeteilt ist. Seine anderen Aufgaben, die Wahl des bureaus, die Ausarbeitung der Geschäftsordnung sind mehr administrativer Natur. (Welche Aufgabe, die auf Berufung des Präsidenten zusammentretende ausserordentliche Sitzung des Art. 15 haben soll, ist nicht gesagt).

(Art. 20 ist nur die Folgerung aus der in Art. 18 der cour zugesprochenen Aufgabe; um diese zu erfüllen, muss die cour natürlich selbst über ihre Kompetenz entscheiden können).

Ist nun das Plenum für die Aufrichtung des Quasikompromisses, d. h. für den Ausspruch, der andere Staat *müsse* sich in das Verfahren einlassen, ein geeignetes Organ? Gewisz nicht. Dafür ist das Plenum viel zu schwerfällig. Es besteht aus einer groszen Zahl von Mitgliedern, die zum Teil ihren Wohnsitz weitab vom Haag haben. Wie lange dauert es, bis man von der pazifischen Küste Süd-Amerikas nach Holland kommt! Das Verfahren würde also unter Umständen sehr verzögert. Meines Erachtens müsste diese Funktion einem anderen Organ übertragen werden. Der Kommission, die in der Hauptsache zu entscheiden hat, kann man diese präjudicielle Entscheidung aber nicht überweisen. Der Voraussetzung nach leugnet ja die eine Partei ihre Einlassungspflicht. Es würde daher schwerhalten, die von ihr bestellten Mitglieder der cour nach Art. 21 zur Kommissionsverhandlung über die Einlassungspflicht heranzuziehen. Freilich bestimmt Art. 23 sehr vorsichtig, dasz Mitglieder der Kommission auch dann, wenn der sie ernennende Staat

sie von der cour abberufen sollte, nicht aufhören, dieser Kommission anzugehören. In diesem Falle aber gehören die Betreffenden der Kommission doch noch kaum an, sondern sollen sie erst in sie eintreten. Und wenn man auch dem Staate das Recht abspricht, sie an dem Eintritte zu hindern, hätte doch die Cour kein Mittel, ihre Teilnahme an der Verhandlung zu erzwingen, wenn sie, vielleicht unter einer gewissen douce violence ihrer Regierung, nicht kommen *wollen*. Ist nun also für die Entscheidung über die Einlassungspflicht (für die Aufrichtung des Quasikompromisses) weder das Plenum, noch die Kommission geeignet, so muss für diese Aufgabe ein besonderes Organ geschaffen werden. Am besten geeignet scheint mir dafür das, allerdings zu verstärkende und zu modifizierende, Bureau présidentiel. Dessen Verstärkung und dessen veränderte Zusammensetzung dürfte übrigens auch aus einem anderen Grunde, der nun zunächst betrachtet werden soll, unvermeidlich sein.

Nach Art. 21 besteht die Einzelkommission aus je 2 von vornherein bestimmten Mitgliedern der Streitteile unter dem Vorsitze eines aus einem dritten Staate berufenen Präsidenten. Bei dieser Zusammensetzung entscheidet eigentlich der Obmann als Einzelrichter. *Er* ist der einzige Umparteiische (umpire). Die anderen 4 Mitglieder der Kommission sind weniger Richter, als vielmehr Vertreter ihres Staates. Die Bedenken, welche ich gegen die Berufung von Nationalen als Schiedsrichtern grundsätzlich hege, habe ich in meinem Buche "Schiedsgerichtsbarkeit" (Stier-Somlo, Handbuch des Völkerrechts III Bd. 3 Abt. S. 123 f. f.) auseinander-

gesetzt. Nationale Schiedsrichter wie George Gray und Sir Charles Fitz Patrick im Falle der nordatlantischen Fischereien oder Lord Alverstone im Alaskafall waren, sind leider nicht die Regel, sondern können nur Ausnahmen sein. Ein weitergehendes Zugeständnis, als Art. 45 Abs. 3 der Friedensakte von 1907 für die nationalen Schiedsrichter macht, (je ein nationaler Schiedsrichter im 5 Richterkollegium) könnte ich nicht zugeben. Aber nicht nur aus den Streitteilen selbst sollen der dritte und der vierte Schiedsrichter nicht berufen werden dürfen, sondern auch nicht aus der Reihe jener Mächte, die mit den Streitteilen in einem offenkundigen Bündnisse stehen. Am besten schiene es mir, wenn jede Partei ausser ihrem Nationalen, noch ein von einer anderen Macht ernanntes Mitglied der cour in die Kommission berufen würde und wenn jedem Streitteile das Recht zustände, 4 oder 5 Mächte auszuschlieszen, aus deren Angehörigen sein Gegner den Schiedsrichter nicht berufen darf. Am allerwichtigsten ist, wie auch der Motivenbericht anerkennt, die vollkommene Unbefangenheit und volle Vertrauenswürdigkeit des Obmannes. Wenn er auch nach dem eben vorgeschlagenen System nicht jene geradezu beherrschende Stellung haben würde wie nach Art. 21 des Entwurfes, so besitzt er doch unter allen Umständen grossen Einflusz auf die Entscheidung. Die Wahl durch das nach Art. 6 zusammengezetzte Bureau scheint mir zur Sicherung seiner Unbefangenheit nicht für alle Fälle auszureichen. Allerdings bestimmt Art. 22 dasz, wenn dem Bureau Mitglieder der Streitteile angehören, diese sich der Abstimmung über diese Wahl

enthalten müssen. Das Bureau besteht nach Art. 6 nur aus drei Mitgliedern. Nun ist es aber nicht ausgeschlossen, dasz zwei Mitglieder des Bureaus den Streitteilen angehören. Dann entscheidet der dritte allein. Und wie, wenn dieser einem Staate angehört, der mit einem der Streitteile verbündet ist? Für unparteiische Wahl des Vorsitzenden wäre vielleicht am besten vorgesorgt, wenn man die Zahl der Mitglieder des Bureau présidentiel wesentlich vermehren und den Parteien ein Ablehnungsrecht gegen jene Mitglieder geben würde, deren Umparteilichkeit nicht vollkommen zweifellos ist. Ich würde vorschlagen, dieses Bureau zu einem ständigen Kommité zu erweitern, das aus etwa 11, 13 oder 15 Mitgliedern bestünde, den drei Präsidenten, und 8, 10 oder 12 aus dem Plenum gewählten Mitgliedern, die alle aus verschiedenen Staaten herstammen müssen. Ist ein Staat in dem Kommité bereits vertreten, so wäre die Wahl eines zweiten Mitgliedes aus diesem Staate ungiltig. Für die Wahl des Obmannes der Kommission würde nun jeder Partei das Recht zukommen, je 4, 5 oder 6 Mitglieder des Komités abzulehnen. Die hinach überbleibenden 3 Mitglieder des Kommités hätten den Obmann der Kommission zu wählen. Würden die Parteien ihr Ablehnungsrecht nicht vollständig ausüben, so dasz etwa eine gerade Zahl von Kommitémitgliedern übrig bliebe, so hätte das Los zu entscheiden wer ausscheiden musz. Art. 22 Abs. 2 bis 4 könnten hinach entfallen. Freilich ginge durch das oben vorgeschlagene System, die Kommissionen zusammenzusetzen, ein Vorteil verloren, den Art. 21 anstrebt und auf den der

Entwurf offenbar Wert legt: Die automatische Zusammensetzung der Kommission hinsichtlich der 4 unmittelbar von den Parteien zu bestellenden Mitglieder. Der Umstand aber, dasz auf diese Weise für die Unparteilichkeit besser gesorgt ist, überwiegt meines Erachtens jenen Nachteil. Will man ganz sicher gehen, dasz das Gericht wirklich u. zw. rechtzeitig zustande komme, so könnte man, wenn die Parteien nicht innerhalb eines Monates die Richter in der vorbenannten Weise bestellt haben sollten, die Berufung der fehlenden Schiedsrichter ebenso wie die des Obmannes dem ständigen Kommité übertragen.

In analoger Weise wie der Obmann aus dem Kommité berufen wird, wenn sich die Parteien über ihn nicht geeinigt haben, sollte meines Erachtens auch jene dreigliederige Kommission zusammengesetzt werden, die über die Frage der Einlassungspflicht (den Abschluss des Quasikompromisses) entscheidet. Würde eine Partei ihr Ablehnungsrecht nicht ausüben, so würden die ihr zustehenden Ausschliessungen durch das Loos erfolgen.

Ausser der Bestellung des Obmannes und der Wahl jener Kommission, die über die Einlassungspflicht entscheidet, dürfte es zweckmäszig sein dem ständigen Kommité auch die Entscheidung über die Verhandlungssprache zu übertragen während der Entwurf diese Entscheidung für den Fall, dasz das Kompromiss die Sprachenfrage nicht geregelt hätte, der in der Hauptsache berufenen Kommission übertragen will (Art. 27). Wenn die Kommission selbst über diese präjudicielle Frage entscheiden muss, liegt die Gefahr

nahe, aus der Art dieser Entscheidung schon auf die Beurteilung der Hauptsache zu schliessen und die Unparteilichkeit der Kommission zu verdächtigen.

Schliesslich könnte das ständige Kommité noch berechtigt werden, Vorschläge zur Reform des Völkerrechts zu machen und damit den künftigen Haager Konferenzen vorzuarbeiten.

Eine principielle Frage ist noch zu beantworten, bevor in weitere Details eingegangen werden kann.

Sollen die vertragschliessenden Staaten verpflichtet sein in allen Fällen arbitrabler Differenzen gerade den durch diese Konvention einzusetzenden Schiedsgerichtshof anzurufen? Soll ihnen nicht die Möglichkeit belassen bleiben auch ein "freies" Schiedsgericht einzusetzen, wenn sie dieses für zweckdienlich erachten? Sollen sie gehindert sein, in einer Tarifsdifferenz z.B. drei oder fünf ihnen vertrauenswürdige Fachmänner zu Schiedsrichtern zu bestellen, weil sie solche unter den Mitgliedern der Cour nicht finden? Dies zu ermöglichen, ist einer der Hauptzwecke des sogenannten summarischen Verfahrens nach Art. 87, F. A. während der entsprechende Art. 54 des Entwurfes auch in diesem Verfahren die Streitteile auf die Mitglieder der Cour als Schiedsrichter beschränkt. Warum soll man aber der freien Bewegung der Staaten in dieser Richtung Schranken setzen? Ein Grund hiefür könnte allenfalls in der Besorgnis liegen, dasz die Streitteile sich zunächst, vielleicht sogar nur scheinbar, darüber einigen würden, ihre Differenz einem solchen freien Schiedsgerichte zu überweisen, dasz sie sich aber dann später uber die Auswahl der

Schiedsrichter, ins besondere über den Obmann, nicht einigen könnten und infolge dessen die Differenz zwischen ihnen unentschieden bliebe. Ungelöste Fragen können aber, wenn später aus anderen Gründen eine feindselige Spannung zwischen den Staaten hinzukommt, deren Beziehungen zu einander so völlig vergiften, dasz auch der Vermittlungsrat den Frieden nicht mehr herstellen könnte. Dieser Gefahr kann aber dadurch begegnet werden, dasz die Streitsache an die Cour übergeht, wenn sich die Parteien nicht innerhalb einer bestimmten kurzen Frist z. B. eines Monates über die Bestellung aller Schiedsrichter, die sie nicht der Cour entnehmen wollen, geeinigt haben.

Nach den oben entwickelten Vorschlägen wäre die ganze richterliche Tätigkeit der Cour ihren Organen übertragen. Das Plenum brauchte erst nach Ablauf der Funktionsperiode des Art. 4 zusammenzutreten um ein neues ständiges Kommité zu wählen. Die Funktionsperiode möchte ich jedoch nicht, wie der Entwurf, mit 12 Jahren bemessen, sondern nur mit 6, oder höchstens mit 10 Jahren. Die Mitglieder des ständigen Kommité's werden ja meist höheren Alters sein. Vakanzen werden sich also nicht selten schon in einigen Jahren in grösserer Zahl ergeben. *Einzelne* Lücken, die der Tod oder schwere Krankheit in die Reihen der Mitglieder gerissen, können ja wohl durch schriftliche oder telegraphische Nachwahlen ausgefüllt werden. Gegen allzugrosse Stimmenzersplitterung, deren Gefahr in Ermanglung einer Vorbesprechung bei schriftlichen Wahlen noch grösser ist als bei mündlichen, müsste dadurch vorgesorgt werden, dasz die rela-

tive Majorität der Stimmen nicht genügt, sondern nur derjenige als gewählt gelten kann, der ausserdem zummindesten etwa ein Drittel der abgegebenen Stimmen erhielt. In Ermanglung dieser Stimmenzahl müsste eine neue Wahl stattfinden. Alle sechs Jahre aber sollte meines Erachtens noch vor völligem Ablauf der Wahlperiode die Möglichkeit einer Erneuerung des ganzen Kommités durch einen Wahlgang in Anwesenheit aller Kommissiomsmitglieder gegeben sein. Wiederwahl selbstverständlich zulässig.

Mit Rücksicht auf den von mir vorgeschlagen Modus der Wahl in die Einzelkommissionen würde es meines Erachtens genügen, wenn jeder Staat zwei Mitglieder der Cour ernennt. An der *Zulässigkeit* der Berufung von 4 Mitgliedern soll aber nicht gerüttelt werden. Allerdings aber dürfte es nicht allen Staaten möglich sein, so wie der Entwurf es will, zwei Mitglieder und ausserden noch zwei Ersatzmänner zu ernennen, ohne das Niveau ihrer Qualifikation herabzudrucken. Da die Mitglieder des ständigen Kommités zur Residenz im Haag verpflichtet sein müssten, wären ihnen die in Art. 8 den Vizepräsidenten zugesprochenen Gehalte zu gewähren. Die Gesamtkosten würden sich durch diesen Vorschlag kaum vermehren ja eher vermindern, weil die Gehälte der übrigen Mitglieder der Cour entfallen können und sie nur, wenn sie tatsächlich als Schiedsrichter funktionnieren den Anspruch auf die Taggelder des Art. 8 Abs. 2 hätten. Den Art. 9 Abs. 2 würde ich streichen und dafür allenfals die Repräsentationsgelder des Präsidenten und der 2 Vizepräsidenten etwas erhöhen.

Die ihnen obliegenden Ausgaben machen sie ja nicht im Interesse ihres Staates, sondern in dem der Gesammtheit. Aber nur nicht zu viel Repräsentation! Dadurch sollen sich die Mitglieder des Schiedsgerichtshofes von dem diplomatischen Korps unterscheiden.

Die Gründe welche mich bestimmen gegen die Zulassung einer Appellation (Art. 48) zu stimmen, habe ich in meinem Buche über die Rechtskraft der Schiedssprüche S. 129 u. ff. und in der Gesamtdarstellung in Stier-Somlos Handbuch S. 212 u.ff. ausführlich entwickelt. Allerdings erklärt Art. 48 den Schiedsspruch nicht an sich für appellabel, sondern gewährt er den Parteien nur das Recht, sich im Kompromiss eine Appellation vorzubehalten. Absolut verbieten kann man das freilich nicht. Aber ich halte es für bedenklich die Aufmerksamkeit der Parteien ausdrücklich darauf hinzulenken. Denn Garantien für ein gerechteres Urteil als das erste war, kann ein Verfahren nach Art des Art. 48 nicht bieten. Unterscheidet sich doch das Appellationsverfahren von jenem in der ersten Instanz nur dadurch, dasz für jede Partei je drei ihrer Angehörigen im Schiedsgerichte sitzen statt zweier. Noch dazu werden in vielen Fällen einige von diesen Mitgliedern gerade mit Rücksicht auf eben diesen Fall ernannt werden, da diejenigen, welche in erster Instanz geurteilt haben, ausgeschlossen sind. Die richterliche Unbefangenheit wird also noch weniger gewahrt sein.

II. Auszer dem Wege des Schiedsgerichtes zeichnet Art. 3 den Mächten, die miteinander in einen

Konflikt geraten sind, noch einen anderen Weg vor, auf dem sie zu friedlicher Auseinandersetzung kommen können. Diese zweite Alternative stellt der *Verständigungsrat* (Conseil de conciliation) dar, der dasjenige leisten soll, was die diplomatischen Konferenzen bisher in manchen Fällen geleistet, in anderen hingegen nicht zustande gebracht haben. Diesem Verständigungsrate obliegt nach dem Entwurfe für alle Fälle die Aufgabe der Begutachtung, unter gewissen Voraussetzungen (Art. 105) aber sogar die der Entscheidung. „In einem solchen Verständigungsrate wäre ein neues Organ der Mediation geschaffen, das es ermöglicht, die Vermittlung obligatorisch zu machen. Die Staaten, die man bisher als die alleinigen Subjekte der Mediation ansah, scheuen begreiflicherweise vor der Verantwortung zurück, die sie durch Anbot oder Annahme der Vermittlung auf sich nähmen. Deshalb kann man ihnen weder in der einen noch der anderen Richtung eine Verpflichtung auferlegen. Nach dem Vorschlage des Comités Heemskerk-Loder obläge diese „friedensrichterliche" Mission nunmehr einer Kommission, in der Vertreter der Parteien unter der Leitung eines Unparteiischen tätig wären. Wenn dieser Letztere auch einer dritten Macht angehöre, so würde er doch deren Verantwortlichkeit nicht engagieren und könnte er, ungehindert durch politische Rücksichten, einzig und allein „dans un esprit de conciliation", seine Ratschläge erteilen (Vgl. hierüber den Bericht von Frau Bugge Wicksell, Recueil I 354). Der hauptsächliche Vorteil der geplanten Institution läge aber darin, dass durch Anrufung

Vermittlungsrates Zeit zur Abkühlung der Leidenschaften gewonnen wäre. Darauf legen Alle, die sich für den Conseil ausgesprochen haben „das entscheidende Gewicht" (Vgl. auch schon Savornin Lohman, Gedachten over Oorlog en Vrede, den Haag 1914 p. 67).

Gerade wegen dieses Momentes werden die auf den Verständigungsrat bezüglichen Bestimmungen des Entwurfes aber aller Wahrscheinlichkeit nach bei einigen Mächten auf weit lebhafteren Widerspruch stossen als jene über das Schiedsgericht. Diese Mächte werden Bedenken tragen, hinsichtlich jener Fälle die sie als nicht arbitrable ansehen, weil sie ihre Ehre oder ihre Lebensinteressen berühren, sich zu einem Verhalten zu verpflichten, das ihnen die Möglichkeit verschliessen würde, wenn auch nicht überhaupt, so doch in dem ihnen als geeignet erscheinenden Zeitpunkte, für die Durchsetzung dieser Interessen mit der gesamten Staatsmacht einzutreten, d. h. den Gegner durch Krieg zu deren Anerkennung zu zwingen. Diese Bedenken werden noch dadurch verstärkt werden, dasz das Verfahren, in das sie sich einlassen sollten, unter Umständen in einem Ausspruche seinen Abschlusz fände, dem sie sich wie einem Schiedsspruche unterwerfen müssten. Das Recht dazu werden sie in so heiklen Angelegenheiten einer Instanz nicht einräumen wollem, die von ihnen unabhängig ist.

Allerdings enthält der Entwurf keine ausdrückliche Bestimmung darüber dasz die Staaten, deren Konflikt vor dem Verständigungsrate verhandelt wird

bis zum Abschlusz dieser Verhandlungen verpflichtet seien, sich der Feindseligkeiten gegeneinander zu enthalten. Mit vollem Rechte aber hebt der Motivenbericht hervor, dasz die Verpflichtung, den Streit vor den Conseil zu bringen, jeder Bedeutung entbehren würde, wenn sie nicht den Verzicht auf das Recht, während der Dauer der Verhandlungen sich zu schlagen, in sich enthälte. "Die erste Pflicht schlieszt die zweite in sich." nur aus dem Grunde lehnt der Entwurf es ab, ausdrücklich ein "Moratorium" für den Beginn der Feindseligkeiten bis zum Schlusse der Verhandlungen vor dem Vermittlungsrate aufzustellen, weil er eine solche ausdrückliche Festsetzung für überflüssig hält. Die Staaten sind also auch nach diesem Entwurfe ganz ebenso, wie nach jenem von Bryce und Dickinson verpflichtet, sich der Feindseligkeiten bis zum Abschlusse jenes Verfahrens zu enthalten. Und dabei ist der Dauer jener Verhandlungen nicht einmal eine Grenze gezogen. Meines Erachtens wäre es vorzuziehen, die allerdings selbstverständliche Pflicht des Aufschubes der Feindseligkeiten für die Dauer des Verfahrens ausdrücklich auszusprechen, sie aber auch zeitlich zu begrenzen, sodasz, wenn die Verhandlungen ungebührlich hinausgezogen würden, die Parteien die Freiheit ihres Handelns wieder erhielten. Die Frist eines halben Jahres dürfte hiefür angemessen sein.

Wer sich erinnert, welchem Widerstande der so bescheidene russisch-niederländische Antrag von 1907 zwischen Kriegserklärung und Kriegseröffnung eine Frist von 24 Stunden einzuschalten, begegnete,

wird zunächst wohl an der Annahme eines so viel weiter gehenden Vorschlags zweifeln. Wird nicht etwa der Staat, der sich vor dem Vermittlungsrate einlässt, besorgen müssen, dasz wenn die Vermittlung nicht gelingt, er später den Krieg unter ungünstigeren Bedingungen werde führen müssen, als wenn er sofort losgeschlagen hätte? Wird er nicht dadurch den Vorteil verloren haben, den er aus seinem Vorsprung aus den Rüstungen hätte ziehen können? Werden nicht deshalb jene Staaten, die ihre Hoffnungen auf die Wucht ihres Schwertes setzen, diesem Vorschlage solange als möglich wiederstreben müssen?

Gerade darin aber, dasz die Kriegserklärung nicht ganz plötzlich als Blitz aus heiterem Himmel erfolgen könne, dasz der Telegraph ausgeschaltet sei, wenn es sich um die Entscheidung über Krieg oder Frieden handelt, gerade in der Gewährung einer Frist, während deren alle auf den Frieden hinstrebenden Kräfte sowohl in den vom Kriege bedrohten Völkern, als in den unbeteiligten Staaten, einen letzten und darum energischesten Versuch machen werden, den Krieg abzuwenden, liegt der hauptsächlichste Vorzug des ganzen Vorschlages. Auf ihn zu verzichten, ist daher unmöglich. [1])

Wird nun der vorherzusehende Widerstand unüberwindlich sein? Ich wage zu hoffen, dasz es, wenn auch nicht sofort so doch allmählich möglich sein

[1]) Keinesfalls aber ist es notwendig, die Staaten während dieser Frist zur Einstellung der Rüstungen zu verpflichten. Im Gegenteil; deren gesteigerte Fortdauer wird einen Vorgeschmack der Lasten des Krieges darstellen und dadurch den Wunsch nach Erhaltung des Friedens nur stärken.

wird, ihn zu brechen. Die Verhältnisse liegen jetzt anders als 1907. Was damals ein Problem der juristischen *Theorie* gewesen ist, die möglichste Vermeidung des Krieges, ist durch die Leiden und Verluste nicht blosz der kriegführenden, sondern sogar auch der neutralen Staaten — mögen auch einzelne Individuen bisher ungeahnte Gewinne aus dem Leiden ihrer Mitmenschen gezogen haben — jetzt eine der allerwichtigsten *praktischen* Aufgaben der Gegenwart geworden, von deren glüchlichen Lösung das Wohl der Nationen, die Zukunft Europas abhängt.

In erster Reihe setze ich meine Hoffnung auf die europäischen Mächte zweiten Ranges, auf die Vereinigten Staaten von Amerika, und auf die A.B.C.-Mächte Süd-Amerikas. Für die ersteren und für die letzten ist der Vorteil des Planes offenbar; er sichert sie gegen einen plötzlichen Ueberfall, auf den sie nicht vorbereitet wären. Die U. St. aber sind das Vaterland des Planes. Er geht zurück auf einen Antrag *Bartholdts* von 1905 und *Bryans* auf der Londoner Konferenz der interparlamentarischen Union von 1906. Nachdem *Bryan* Staatssekretär geworden, machte er 1913 allen Mächten den Vorschlag, mit Amerika Verträge abzuschlieszen, durch die sie sich gegenseitig verpflichten, bevor sie zu den Waffen greifen, alle ihre Streitigkeiten einer Kommission mit neutralem Vorsitzenden zur Begutachtung vorzulegen. Fast alle Staaten, auch Oesterreich-Ungarn und das Deutsche Reich, haben diesem Plane im Prinzipe zugestimmt; 30 europäische und amerikanische Staaten haben solche Verträge mit den U. St. unterzeichnet, sechzehn von

ihnen sind bis zum 1. November 1915 ratifiziert worden, darunter jene mit vier Groszmächten (Frankreich, Groszbritannien, Italien und Ruszland). Man kann sich also wohl der Hoffnung hingeben, dasz die Vereinigten Staaten ein Prinzip, das sie in so vielen Einzelverträgen anerkannt haben, auch in einem Kollektivvertrage nicht ablehnen werden. Als Symptom dafür kann man es wohl ansehen, dasz der Expräsident Taft mit Energie dafür eingetreten ist und dasz der Verband der amerikanischen Handelskammern am 17. Januar 1916 mit der imposanten Mehrheit von 744 gegen 28 Stimmen beschlossen hat, die Regierung aufzufordern, sie möge die Initiative zur Schaffung eines internationalen Council of conciliation ergreifen.

Viellicht werden aber doch auch einzelne europäische Groszmächte, durch die Erfahrungen des Krieges belehrt und durch die Rücksicht auf die Stimmungen ihrer Völker bewogen werden, die einseitig militärischen Bedenken, die sie 1907 bei der Ablehnung des russisch-niederländischen Antrages bestimmt hatten, nun mehr zu überwinden. Ob man dies erwarten könne, ist eine Frage die sich meiner Beurteilung entzieht, deren Diskussion übrigens auch im gegenwärtigen Zeitpunkte gewisz nicht opportun wäre.

Sollte, wie ich zu hoffen wage, eine Reihe von bedeutenden Staaten, wenn auch nicht gerade die europäischen Groszmächte, sich verpflichten, alle ihre Streitigkeiten, sofern sie nicht im diplomatischen Wege erledigt wurden, oder einem Schiedsgerichte

überwiesen werden können, bevor sie zu Feindseligkeiten gegeneinander schreiten, einem Vermittlungsrat zu überweisen, so müszte dieses Beispiel gewisz auch auf andere Staaten von mächtiger Anziehungskraft sein. Alle Kräfte, die irgendwo nach einer friedlichen Organisation der Welt streben, werden es sich zum Ziele setzen, auch ihren Staat zur Nachfolge zu bewegen. Wird die Erinnerung an die Leiden und Verluste des gegenwärtigen Krieges im Bewusstsein der Völker nicht etwa durch trügerische Verherrlichungen des Krieges völlig verdrängt, so werden auch die widerstrebendsten Regierungen genötigt sein jenem Friedensbunde beizutreten. Kirche, Schule und Presse, als die das Volksempfinden am meisten bestimmenden Elemente, werden in dieser Beziehung viel gutes, oder auch — übles wirken können.

Die praktische Durchsetzung des Gedankens wäre meines Erachtens sehr erleichtert, wenn man darauf verzichten würde, den Gutachten des Vermittlungsrates bindende Wirkung beizulegen, was der Entwurf für den Fall vorschlägt, dasz von den zwei Mitgliedern jenes Staates, gegen den es ausfällt, eines zugestimmt hätte. (Art. 105) Dieser Fall ist an und für sich sehr unwahrscheinlich. Denn jede Regierung wird zu Mitgliedern des Vermittlungsrates nur solche Personen ernennen, auf deren absolute Gefügigkeit sie mit Bestimmtheit rechnen kann. Obwohl diese Bestimmung daher ziemlich unpraktisch wäre, würde sie für manche Regierung doch ein Motiv, oder einen Vorwand zur Ablehnung des ganzen Vorschlages abgeben. Denn ganz ausgeschloszen ist es ja doch nicht,

dasz sich einmal ein Kommissionsmitglied, etwa sogar durch unsachliche Motive, bestimmen liesse, gegen seine Regierung, oder etwa gar gegen sein Vaterland zu stimmen. Sollte man darum nicht lieber auf diese Norm verzichten, um das Zustandekommen des Vertrages in seinen übrigen Bestandteilen zu erleichtern? Meines Erachtens wäre die Aufgabe des Verständigungsrates darauf zu beschränken, ein Gutachten abzugeben und — formell unverbindliche — Ratschläge für die Beilegung des Streites zu erteilen.

Das Verfahren vor der Kommission wäre wohl meistens ein geheimes; Gutachten und Ratschläge aber müszten *unter allen Umständen* auch gegen den Willen einer Partei veröffentlicht werden (Art. 106 und 110 wären demgemäsz zu ändern). Könnte sich die Kommission über Gutachten und Ratschläge nicht einigen, so wären die Voten der einzelnen Mitglieder zu veröffentlichen. Jedoch müszten sich die Regierungen verpflichten, diese Voten *insgesamt*, nicht etwa blosz die ihnen günstigen zu publizieren. Eine gesonderte Veröffentlichung einzelner Voten auch durch Privatpersonen müszte von allen Staaten mit Strafe bedroht werden. Diese Gutachten würden der ganzen Welt zur Information dienen und die öffentliche Meinung in allen Staaten bestimmen. Ueber diese aber können sich die Mächte immer weniger hinwegsetzen. Der gute Ruf der Staaten ist ein wesentlicher Teil ihres politischen Kapitales, ein Element ihrer Kraft. Damit die Gutachten wirken können, musz das "Moratorium" der Feindseligkeiten noch einige Zeit (1—2 Monate) nach deren Veröffentlichung andauern.

Der Conseil ist nach Art. 86 und 87 des Entwurfes aus je 2 bis 4 Vertretern jedes Staates zusammenzusetzen. Meines Erachtens wäre die Zahl zu erhöhen. Die Mitgliedschaft wäre mit jener der Cour unvereinbar. Auch in Betreff der Zusammensetzung der Kommissionen hätte ich hier keine so grossen Bedenken wie beim Schiedsgericht gegen die Zuziehung von je 2 Nationalen jeder Partei. Immerhin verdient es Beachtung, dass die grosse Mehrzahl der Bryan-Verträge nur je einen Nationalen zulässt. Ein Nationaler ist in diesem Falle unbedingt nötig.

Die Wahl des Obmannes würde ich nach Analogie der oben gemachten Vorschläge einem ständigen Komite übertragen.

Sollte eine grössere Zahl von Staaten dem Vertrage beitreten, so müsste dieses Komite so zahlreich sein, dass in ihm alle auf den Gang der Weltgeschichte einflussnehmenden Mächte vertreten sein können, so weit sie eben Teilnehmer am Vertrage sind. Diesem Komite würde ich auch alle jene Aufgaben zuweisen, die der Entwurf dem Conseil als von amtswegen zu erfüllende überträgt (Art. 107). Die Tätigkeit des Plenum wäre m.E. darauf zu beschränken, das Komite zu wählen. Die in Art. 109 ihm zugeteilte Mission wäre ja schon durch die Kommission erledigt.

Auch für den Conseil würde nach diesen Abänderungsvorschlägen die nahezu automatische Zusammensetzung der Kommission entfallen. Die Verfasser des Entwurfs werden dies für einen Nachteil halten. Ich aber möchte glauben, dass gerade die Starrheit der Kommission manche Mächte von der Annahme

des Vorschlages abhalten könnte. Wie schwer es den Staaten fällt, sich an eine von vornherein bestimmte Kommission zu wenden, bezeugt der Umstand, dass 5 der Bryan-Verträge den Parteien sogar das Recht geben die bereits erfolgte Ernennung von Kommissionsmitgliedern zu wiederrufen und dass 5 andere dieser Verträge die Kommission bloss für ein Jahr bestellen wollen. Mit vollem Rechte tadelt Lange in seiner trefflichen Darstellung der amerikanischen Friedensverträge beide Bestimmungen. Der gegenwärtige Vorschlag würde das Zustandekommen der Kommission für alle Fälle sichern, ohne die Freiheit der Mächte unnötig zu beschränken. Für den Fall, dass eine der Parteien es versäumen würde innerhalb einer angemessenen Frist ihre Vertreter für die Kommission zu ernennen, müsste auch hier deren Auswahl dem ständigen Komite, (mit Ausschluss des Vertreters der Gegenpartei) zustehen.

Der Entwurf sucht einen gewissen Parallelismus zwischen Cour und Conseil herzustellen, was nur konsequent ist, weil er, wenn möglich, auch vom Conseil nicht nur ein Gutachten, sondern ein Urteil erzielen will. Wenn man sich aber, wie hier vorgeschlagen wird, darauf beschränkt, vom Conseil nur ein Gutachten und Ratschläge zu verlangen, so ergibt sich ein ziemlich scharfer Gegensatz zwischen beiden Institutionen in einigen Beziehungen. Deshalb scheinen mir manche Bestimmungen des Entwurfes über den Conseil nicht ganz passend und deshalb halte ich es auch für wünschenswert, die sehr dürftigen Normen über das Verfahren vor dem Conseil zu erweitern. Dieses Verfahren

muss nach vielen Richtungen von dem schiedsgerichtlichen Verfahren verschieden sein. Wir müssen uns stets gegenwärtig halten, dass es sich vor dem Conseil um Verständigung und Vermittlung handelt. In den *verschiedenen* Fällen werden *verschiedene Persönlichkeiten* hiezu erforderlich sein. Deshalb muss der Kreis derjenigen Personen, unter denen die Parteien ihre Vertreter wählen können, hier ein grösserer sein als beim Schiedsgericht. Ich beantrage daher, die Zahl der von jeder Partei zum Conseil zu ernennenden Mitglieder auf 4 bis 6 zu erhöhen. Die wechselnden politischen Verhältnisse dürften es empfehlen, das Präsidium schon in kürzerer Zeit wechseln zu können. Ich beantrage daher die Funktionsdauer des Präsidiums auf 3 Jahre einzuschränken. Wiederwahl ist selbstverständlich nicht ausgeschlossen.

Im Conseil kann und soll meines Erachtens der Einfluss der Parteien auf die Zusammensetzung der Kommissionen stärker sein als beim Schiedsgerichte. Deshalb möchte ich hier den Parteien jenes Ausschliessungsrecht nicht gewähren, das mir beim Schiedsgericht zur Erzielung der richterlichen Unabhängigkeit unerlässlich erscheint.

Damit im Verfahren neben dem einseitigen Interesse der Parteien auch das allgemeine Interesse aller Vertragsstaaten zur Geltung komme, scheint mir zur Vertretung dieser letzteren Interessen die Zulassung eines *Friedensanwaltes* wünschenswert. Um zuverhindern, dass auch dieser sich etwa auf den Standpunkt einer Partei stelle, und zu sichern, dass dieser wirklich nur das allgemeine Interesse wahre, schlage

ich vor, zu dessen Wahl eine besonders verstärkte Stimmenmehrheit ($^2/_3$ oder $^3/_4$) zu fordern. Der Friedensanwalt hätte auch das Recht, an die Parteien Fragen zu stellen und sie um Aufklärungen zu ersuchen. Zur Beantwortung dieser Fragen und zur Gewährung dieser Aufklärungen können die Parteien allerdings nicht verpflichtet werden. Aber auch das Schweigen wäre konkludent.

Mit Rücksicht darauf, dass die von den Parteien berufenen Kommissionsmitglieder in diesem Falle nicht Richter sondern Vertreter sind, kann den Parteien das Recht, sie abzuberufen und durch andere zu ersetzen, nicht wie beim Schiedsgericht abgesprochen werden. Wird man doch selbst gegenüber dem Schiedsgerichte die Wirksamkeit der Abberufung nicht so unbedingt ausschliessen können wie Art. 23 will. Nur wird man Sicherheiten dagegen schaffen müssen, dass ein Mitglied etwa nur aus dem Grunde seiner Unbeeinflussbarkeit und Unparteilichkeit abberufen werde. Bei den Kommissionen des Conseil fallt dieses Bedenken weg. Nur der Vorsitzende der Kommission, der ja auch in diesem Falle nicht Parteiorgan ist, darf niemals abberufen werden. Fur den Fall des Todes, oder sonstiger tatsächlicher Verhinderung, muss für eine moglichst rasche Kompletierung der Kommission gesorgt werden.

Während die Verhandlungen der Schiedsgerichte in sehr vielen Fällen öffentlich sein können, wird dies bei den Beratungen des Vermittlungsrates nur seltener der Fall sein. Einer der Hauptgründe für die Schaffung dieses Verfahrens ist es aber, die öffentliche Meinung der ganzen Welt, sowohl der mit einander strei-

tenden Staaten als auch der nicht unmittelbar beteiligten, aufzuklären und zu beruhigen, ihre Irrtümer zu berichtigen und ihre Leidenschaften zu beschwichtigen. Darum können die Verhandlungen der Kommission nicht völlig in das Amtsgeheimnis gehüllt bleiben, wenn auch nicht gerade Zuhörer zu ihnen zugelassen werden können. Es müssen also Berichte über diese Verhandlungen veröffentlicht werden. Soll aber der Zweck der Aufklärung und Beruhigung nicht völlig verfehlt werden, so darf nicht etwa jede Partei aus den Verhandlungen bloss das publizieren was ihr passt und die Ausführungen ihrer Gegnern und des Friedensanwaltes verschweigen, oder entstellen. Die zu veröffentlichenden Berichte müssen vielmehr möglichst unparteiisch gehalten sein. Das dürfte am besten dadurch zu erzielen sein, dass beide Parteien nur solche Berichte veröffentlichen dürfen, die ihnen als von der Kommission selbst approbierte Auszüge aus den Protokollen zur Verfügung gestellt werden. Am meisten würde es sich vielleicht empfehlen, wenn die Kommission zwei Auszüge, einen ausführlicheren und einen kürzeren den Parteien übermitteln würde, damit diese sie ihren grösseren oder kleineren Zeitungen, je nach deren Wünschen zukommen lassen. Beide Auszüge aber müssten von der gleichen strengen Unparteilichkeit sein. Andere Berichte als diese aber dürften nirgends veröffentlicht werden. Werden sich die Staaten einem solchen Verbote aber auch fügen? Ich bin davon überzeugt. Denn jener Staat, der diesem Verbote zuwider die von der Kommission ihm zur Verfügung gestellten Berichte entstellt oder verstümmelt hätte,

würde durch eine solche Beleidigung der Kommission seiner Sache gewiss nur schaden. Er wird sich daher wohl hüten dies zu tun.

Damit jene Aufklärung und Beruhigung, die die authentischen Berichte und das Gutachten bezwecken, nicht durch Personen paralysiert werde, die jeder Verantwortung enthoben sind, ist es auch notwendig die Kritik jener Berichte und des Gutachtens für die Dauer des den Parteien auferlegten Moratoriums auszuschliessen. Freilich wird die Presse aller Parteien sich einem solchen Vorschlage auf das lebhafteste widersetzen. Wenn man aber bedenkt, welche schwere Mitschuld die Presse aller kriegsführenden Staaten an der Entstehung des Krieges trägt und welche Knebelung die Presse sich allerorten im Interesse des Krieges gefallen lassen muss, so sind jene im Interesse des Friedens ihr aufzulegenden Einschränkungen doch nur ganz geringfügige. Soll das hohe Ziel erreicht werden, so ist dieses Opfer unvermeidlich.

Um jede Lücke zwischen Cour und Conseil zu schliessen, sind zwei ergänzende Normen notwendig. Erstens muss bestimmt werden, dass in allen Fällen, in denen das ständige Kommite des Schiedsgerichtshofes den Antrag einer Partei, die andere zur Einlassung vor dem Schiedsgerichte zu verpflichten, abgewiesen hat, die Sache sofort an den Conseil übergehe. Zweitens muss der Conseil auf Verlangen auch nur einer Partei sich mit der Sache befassen können, wie auch art. 98 vorsieht. Die widerstrebende Partei wäre in diesem Falle vom ständigen Kommite aufzufordern, binnen einer kurzen Präclusivfrist ihre Mitglieder für die Kommission

zu bestellen, widrigenfalls das ständige Kommite diese Mitglieder ernennen würde.

Gewiss wäre es an sich wünschenswert, sowie dies art. 107 vorschlägt, dem Conseil auch das Recht der Initiative für den Fall zu geben, dass zwischen zwei oder mehreren Staaten ein schwerer Konflikt erst bevorsteht. Würde man aber dadurch nicht doch zu sehr in das Recht der Staaten eingreifen, selbst zu bestimmen, welche Konflikte allenfalls zu einem Kriege führen könnten und ihre Streitigkeiten bis zu der kritischen Wendung zunächst selbst untereinander abzumachen? Ich fürchte, dass auch diese Bestimmung Staaten, die sonst dem Plane geneigt wären, ihm abwendig machen würde. Darum möchte ich sie wenigstens zunächst nicht aufnehmen.

Gegen Vertragsmächte, die pflichtwidrig einen Krieg erklären oder beginnen, ohne ihren Streit vorher dem Vermittlungsrate vorgelegt zu haben, sieht der Entwurf keine gemeinsamen staatlichen Zwangsmassregeln vor. Meines Erachtens mit Recht. Wer sollte auch sie anordnen? Sollte ein Mehrheitsbeschluss der Vertragsmächte deren Minderheit verpflichten, an einem ökonomischen Boykott, oder gar an militärischen Operationen teilzunehmen? Vielleicht würde aber ihr eigenes wirtschaftliches Interesse dem Boykott geradezu widerstreben. Müssten sie sich auch trotzdem dem Beschlusse der Mehrheit fügen? Oder wie sollte das Mass der militärischen Beihilfe für die einzelnen Staaten abgegrenzt werden? Würde aber Einstimmigkeit der Vertragsmächte erfordert, damit Zwangsmassregeln ergriffen werden können, so ent-

stünden neue Schwierigkeiten. Wohl aber könnte bestimmt werden, dass der Vertragsstaat, der die Pflicht, zunächst, die friedliche Schlichtung des Konfliktes zu suchen, verletzt hat, dadurch jedes Recht aus den von ihm geschlossenen Allianzverträgen verwirkt, wie dies auch der Entwurf Bryce-Dickinson Art. 17 vorschlägt. Ausserdem könnten und sollten die Vertragsmächte sich verpflichten von dem vertragsbrüchigen Staate den Ersatz alles Schadens zu beanspruchen, den ihre Angehörigen in diesem Kriege von ihm und seinem Gegner erlitten haben, sowie ihren Angehörigen jede Unterstützung des vertragsbrüchigen Staates zu untersagen, während sie ihnen jede Unterstützung seines Gegners erlauben [1])

Diese Vorschläge unterscheiden sich sehr wesentlich von denjenigen nach welchen der Staat selbst aus seiner Neutralität heraustreten und zum ökonomischen Boykott, oder zu militärischen Operationen schreiten sollte. Eine Norm wie die oben vorgeschlagene wäre zunächst für den Fall zu vereinbaren, dass eine der Vertragsmächte gegenüber einer anderen die nach art. 3 ihr obliegende Pflicht, in der einen oder der anderen Art eine friedliche Lösung des Konfliktes zu suchen, verletzt hätte. Aber auch für den Fall, dass

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[1]) Vgl. meine Aufsätze „Beruf der Neutralen" in der Internationalen Rundschau I (1915) s. 6 ff., Mediationsrecht der Neutralen in der Oesterr. Ztschr. für öffentliches Recht II (1915) s. 205 ff. und das Schlusskapitel eines demnächst in Verlag des Nobelinstitutes (Kristiania) erscheinenden Buches „Das Völkerrecht nach dem Kriege", sowie die beiden Abhandlungen: „Zwei Wege zu dauernden Frieden" in der „Friedenswarte" (Blätter für zwischenstaatliche Organisation) März und Mai 1915.

eine Macht, die diesem Vertrage nicht beigetreten ist, eine der Vertragsmächte in jener Weise überfällt, liegt es nahe, dass die übrigen Vertragsmächte sich über gemeinsames Verhalten der bezeichneten Art gegenüber demjenigen Staate einigen, der einen Krieg beginnt, ohne vorher die friedliche Ausgleichung der Differenz durch Anrufung oder Annahme der Vermittlung befreundeter Mächte oder durch ein dem internationalen Vermittlungsrate analoges, für den besonderen Fall zu bestimmendes Organ versucht zu haben. Ja selbst dazu um einem Kriege zwischen Mächten, die beide diesem Vertrage nicht beigetreten sind, vorzubeugen, mag es dienen, dass die Vertragsmächte insgesamt oder einzeln, sich ein Verhalten der bezeichneten Art vorbehalten.

III. Gar nicht zu billigen vermag ich die Stellung der internationalen Untersuchungskommissionen in diesem Entwurfe. Zweifellos sind diese Kommissionen ein unentbehrliches Glied in der Reihe der im Haag geschaffenen Friedensinstitutionen. Es ist daher auf das lebhafteste zu beklagen, dass in den Balkankriegen und auch in der Vorgeschichte des gegenwärtigen Krieges von ihnen gar kein Gebrauch gemacht wurde, obwohl einzelne Ereignisse geradezu Schulbeispiele für deren Anwendung geboten hätten. In dem Entwurfe eines Vertrages aber, der wie der gegenwärtige die Staaten *verpflichten* will, *alle* ihre Differenzen friedlich zu *schlichten* hat die *Empfehlung* eines besonderen Mittels zur *Vorbereitung* dieser Schlichtung keinen Platz und zwar um so weniger als diese Empfehlung durch die Kombination der Interessenklausel mit der Umstands-

klausel durchbrochen ist. "Die tatsächlichen Umstände" zu deren Feststellung und Beurteilung die internationalen Untersuchungskommissionen berufen werden sollen, sind eine *Vorfrage* für die Entscheidung, die das Schiedsgericht zu treffen, oder für das Gutachten, das der Verständigungsrat abzugeben hat. In welchem Verhältnis soll die von der Untersuchungskommission gegebene Antwort auf diese Vorfrage zu jener Entscheidung, oder jenem Gutachten stehen? Die F. A. art. 35, die ja keine Pflicht kennt, sich an das Schiedsgericht zu wenden, lässt den Parteien "volle Freiheit in Ansehung der Folge, die sie der Feststellung der Tatsachen durch die Untersuchungskommission geben wollen." Die Parteien können daher auch unmittelbar, nach dem dieses Gutachten abgegeben worden, gegeneinander zu den Waffen greifen. Im System des Entwurfes ist dies selbstverständlich vollkommen unzulässig. Es ist daher unbegreiflich, dass art. 84 des Entwurfes den art. 35 der Friedensakte einfach wiederholt. Das Gutachten der Untersuchungskommission könnte daher keinesfalls von den Parteien als non avenu behandelt werden. Sollte es aber nun etwa das Schiedsgericht oder den Vermittlungsrat binden, an die sich die Parteien wenden *müssen?*

Dann wäre häufig der ganze Streit schon durch die Untersuchungskommission entschieden. Und es läge hierin ein Mittel die Lösung vertragswidrig dem Schiedsgerichte oder dem Vermittlungsrate zu entziehen. Das Gutachten der Untersuchungskommission könnte daher nur die Bedeutung haben, dass es von der, zur Beurteilung der Hauptsache berufenen In-

stanz *berücksichtigt* werden müsse. Ist es dazu aber notwendig das Verfahren so zu komplizieren und ein besonderes Organ zu schaffen?

Mögen diese apologetischen und kritischen Bemerkungen zum Entwurfe dadurch, dass sie das wesentliche an ihm hervorheben und zugleich andeuten, nach welchen Richtungen hin etwa Einschränkungen gemacht werden könnten, ohne das Wesen zu gefährden, dazu beitragen, dass der Entwurf zur Grundlage einer Verständigung der Mächte über die Mittel zur Bewahrung des Friedens für die Zukunft genommen werden könne.

ENTWURF EINES ALLGEMEINEN VERTRAGES ZUR FRIEDLICHEN SCHLICHTUNG INTERNATIONALER DIFFERENZEN.

(Die ziffern in Klammer beziehen sich auf den Kommissionsentwurf.)

Einleitende Bestimmungen.

Art. I (2). Zum Zwecke der Aufrechtserhaltung des allgemeinen Friedens verpflichten sich die vertragschliessenden Mächte, alle ihre Streitigkeiten ohne jede Ausnahme entweder zur *Entscheidung* einem Schiedsgericht, oder zur *Begutachtung* dem internationalen Verständigungsrate vorzulegen.

Art. II (3). Die vertragschliessenden Mächte verpflichten sich, den ergangenen Schiedsspruch seinem ganzen Inhalte nach, in der vom Schiedsgerichte bestimmten Art und innerhalb der von diesem bestimmten Zeit auszuführen.

Ebenso verpflichten sich die vertragschliessenden Mächte in Falle der Anrufung des internationalen Verständigungsrates nicht früher als (30) Tage, nach dem ihnen dessen Gutachten bekannt gegeben worden, der Gegenpartei den Krieg zu erklären, oder irgend welche Feindseligkeiten gegen sie zu eröffnen.

Art. III (1.) Die vertragschliessenden Mächte errichten gemeinsam einen Schiedsgerichtshof und einen Verständigungsrat im Haag.

I. *Der internationale Schiedsgerichtshof.*

Art. 1. (4.) Der Schiedsgerichtshof besteht aus den von den vertragschliessenden Mächten ernannten Richtern.

Jede der vertragschliessenden Mächte ernennt mindestens (2) und höchstens 4 Richter für die Dauer von 6 Jahren. Zwei Monate vor Ablauf dieser Zeit erfolgen neue Ernennungen.

Wiederernennung der früheren Mitglieder ist zulässig.

Art. 2 (6) Der Schiedsgerichtshof wählt durch Stimmenmehrheit einen Präsidenten und zwei Vicepräsidenten für 6 Jahre.

Bei dieser Wahl hat jeder Staat nur eine Stimme. Das stimmberechtigte Mitglied wird von seiner Regierung bezeichnet.

Zur Giltigkeit der Wahl wird mindestens ein Drittel der abgegebenen Stimmen erfordert.

Bei gleicher Stimmenzahl entscheidet das Los.

Art. 3 (-) Der Schiedsgerichtshof wählt für 6 Jahre (12) Mitglieder in ein ständiges Kommite.

Der Präsident und die Vicepräsidenten sind von amtswegen Mitglieder dieses Kommites dessen Mitglieder die diplomatischen Privilegien geniessen.

Die Mitglieder des ständigen Kommites müssen alle nach ihrer Staatsbürgerschaft verschiedenen Staaten angehören und von verschiedenen Staaten zum Schiedsgerichtshofe bestellt sein.

Die Wahl erfolgt nach Stimmenmehrheit.

Die drei letzten Absätze des Art. 2 finden Anwendung.

Art. 4. (-) Ersatzwahlen an Stelle eines ausscheidenden Mitgliedes des ständigen Kommites erfolgen innerhalb eines Monates durch schriftliche oder telegrafische Abstimmung, wenn die Abstimmenden gehindert sind persönlich zu erscheinen.

Die schriftliche oder telegrafische Abstimmung wird durch die dem Wohnsitz des Abstimmenden nächstgelegene niederländische oder schweizerische Gesandtschaft (Generalkonsulat) übermittelt.

Die drei letzten Absätze des Art. 2 finden Anwendung.

Art. 5 (-) Die Mitglieder des ständigen Kommites haben ihren Wohnsitz im Haag.

Bei Antritt ihres Amtes legen sie ein feierliches Gelöbnis ab.

Art. 6 bis 13 (8—15) Bestimmungen über Gehalte und Diäten, über den Ort der Verhandlungen (grundsätzlich im Haag; niemals darf das Schiedsgericht im Gebiete eines der Streitteile tagen) über Geschäftsordnung, Präsidialberichte, erstes Zusammentreffen des Plenums, Vereinbarkeit des Schiedsrichteramtes mit der Mitgliedschaft des Oberprisengerichtes.

Art. 14 (-) Die Vereinigten Staaten von Amerika, die Niederlande, Norwegen, Spanien und die Schweiz für den Fall, dass diese Staaten dem Vertrage beitreten, bestellen durch übereinstimmenden Beschluss einen Generalsekretär und zwei Sekretäre auf Lebenszeit.

Diese sind berufen die Protokolle der Verhandlungen zu führen.

Bei Antritt ihres Amtes leisten sie ein feierliches Gelöbnis.

Sie haben ihren Wohnsitz im Haag.

Von der Protokollführung im einzelnen Falle sind diejenigen ausgeschlossen, welche einem der Streitteile angehören.

Für den Fall des Erfordernisses bestellen die in Abs. 1. bezeichneten Mächte zum Voraus fünf stellvertretende Sekretäre für die Dauer von 6 Jahren. Diese werden im Falle des Erfordernisses einberufen und leisten bei Antritt ihres Amtes das Gelöbnis.

Art. 15. (-) Bestimmungen über Gehalte der Sekretäre und Diäten der stellvertretenden Sekretäre.

Art. 16. (-) Spätestens einen Monat nach Ablauf der 6-jährigen Wahlperiode treten die Mitglieder des Schiedsgerichtshofes zu einer Vollversammlung im Haag zusammen um die Wahlen des Präsidiums und des ständigen Kommittees vorzunehmen.

Art. 17. (16) Der Schiedsgerichtshof entscheidet über alle Streitigkeiten rechtlicher Natur zwischen den vertragschliessenden Staaten.

Er entscheidet durch eine Kommission deren Mitglieder die diplomatischen Privilegien geniessen. (Art. 22).

Als Streitigkeiten rechtlicher Natur gelten:

1. alle diejenigen, welche die Auslegung und Anwendung von Grundsätzen des zwischen den Parteien geltenden Völkerrechts, insbesondere auch der zwischen ihnen abgeschlossen Staatsverträge betreffen.

2. alle diejenigen, welche Bestand und Ausmass von Schadenersatzansprüchen wegen Verletzung von vertragsmässigen oder sonstigen völkerrechtlichen

Pflichten zwischen zweien oder mehreren der vertragschliessenden Mächte betreffen.

3. alle diejenigen, die durch besonderen Vertrag zwischen den Parteien vor ein Schiedsgericht gewiesen sind.

Art. 18. (17) Haben die im Streite befindlichen Staaten ein Kompromiss abgeschlossen, so ist dieses für das Schiedsgericht bindend.

Wenn die im Streite befindlichen Staaten sich gemeinsam an den Schiedsgerichtshof wenden, damit dieser das Kompromiss für sie abschliesse, so wird es von dem ständigen Komittee formuliert.

Art. 19 (18) Auch wenn nur einer der beiden Streitteile bereit ist, sich in das Verfahren vor dem Schiedsgerichtshofe einzulassen, kann das ständige Kommite den anderen Teil verpflichten in das Verfahren einzutreten:

1. wenn die Streitfrage ihrer Art nach zufolge Art. 17 zur Zuständigkeit des Schiedsgerichtshofes gehört und wenn sie ausserdem zufolge eines nach Rechtskraft dieser Konvention abgeschlossenen oder erneuerten Vertrages schiedsgerichtlich auszutragen ist, ausgenommen den Fall, dass die eine Partei die Zugehörigkeit der Sache zur Kategorie der schiedsgerichtlich auszutragenden Streitigkeiten verneint und die Entscheidung dieser Vorfrage dem Schiedsgericht durch den Vertrag ausdrücklich entzogen ist;

2. wenn die Streitfrage Ansprüche aus Vertragsschulden betrifft, die eine der vertragschliessende Mächt für ihre Angehörigen geltend macht,

wenn vereinbart ist, dass der Streit schiedsgerichtlich auszutragen sei und die Entscheidung über die Einlassungspflicht nicht etwa ausdrücklich anders geordnet wurde.

Art. 20. (—) Ueber die Einlassungspflicht entscheidet eine Kommission von 3 Mitgliedern des ständigen Kommites. Diese Kommission wird dadurch gebildet, dass jede der beiden Parteien solange eine gleichgrosse Anzahl von Mitgliedern ablehnt, bis nur drei übrig bleiben.

Sollte eine der Parteien ihr Ablehnungsrecht nicht vollständig ausüben, so erfolgen die Ausschliessungen die ihr zustünden durch das Los.

Ebenso scheidet ein Mitglied durch das Los aus, wenn die Zahl der Mitglieder des ständigen Kommites eine gerade wäre.

Art. 21. (98, 2) Verneint die in Art. 20 bezeichnete Kommission die Einlassungspflicht, so geht die Sache von selbst an den Verständigungsrat über.

Art. 22. (21) Ueber die Streitfrage selbst entscheidet eine Kommission von 5 Mitgliedern des Schiedsgerichtshofes.

Je eines dieser Mitglieder wird von jedem der beiden Streitteile aus der Zahl der von ihm selbst bestellten Mitglieder des Schiedsgerichtshofes gewählt.

Je ein weiteres Mitglied wird von jedem der beiden Streitteilen, aus der Zahl der von anderen Mächten bestellten Mitglieder gewählt, jedoch so, dass jeweils der Gegenpartei das Recht zusteht, die Vertreter von.... Staaten auszuschliessen.

Das 5. Mitglied, welches den Vorsitz führt, wird

von den Streitteilen durch übereinstimmende Wahl bestellt.

Art. 23. (—) Uebt ein Streitteil das nach Art. 22 Abs. 2 und 3 ihm zustehende Recht innerhalb eines Monates nicht aus, so geht dieses Recht an eine Kommission von 3 Mitgliedern über, die aus dem ständigen Kommite nach Ausschliessung der Vertreter der Streitteile durch das Los gebildet wird. Einigen sich die Streitteile innerhalb eines Monates nicht über die Wahl des Obmannes, so geht das Recht ihn zu bestellen an eine Kommission von 3 Mitgliedern über, die aus dem ständigen Kommite nach Vorschrift des Art. 20 gebildet wird. Bei Antritt ihres Amtes legen die Mitglieder der Kommission ein feierliches Gelöbnis ab.

Art. 24. (19) Die Kommission des ständigen Kommites, (Art. 20) entscheidet selbst über ihre Berechtigung, die Einlassungspflicht nach Art. 19 auszusprechen.

Die Kommission (Art. 22) die in der Hauptsache zu entscheiden berufen ist, entscheidet selbst über den Umfang ihrer Zuständigkeit.

Art. 25. (23) Wenn ein Mitglied des ständigen Kommites oder einer Kommission von seinem Staat abberufen wird, hat es gleichwohl an der Beratung und Beurteilung der bereits anhängigen Sache mitzuwirken, ausser wenn die Abberufung von der Kommission mit Stimmenmehrheit und vom ständigen Kommite mit $^2/_3$ Mehrheit genehmigt wird.

Art. 26. (25) Der Ersatz ausfallender Mitglieder von Kommissionen des Schiedsgerichtshofes erfolgt

innerhalb 14 Tagen in derselben Weise, in welcher, das zu ersetzende Mitglied bestellt worden war.

Im Falle der Versaümnis dieser Frist erfolgt die Bestellung durch das Kommite.

Art. 27. (—) Das ständige Kommite ist berechtigt aus eigener Initiative Gutachten und Vorschläge über die Fortbildung des Völkerrechts den Regierungen der vertragschliessenden Mächte zu unterbreiten.

Die Bestimmungen über das schiedsgerichtliche Verfahren folgen im Allgemeinen dem Vorbilde der Haager Akte von 1907 Art. 60 bis 82, 84 und 85 und der im grossen und ganzen mit ihnen übereinstimmenden Art. 25 bis 47, 51 und 52 der Vorschläge des niederländischen Kommittees.

Vielleicht würde es sich empfehlen folgenden Artikel am Schlusse des Abschnittes einzuschalten.

"Die vertragschliessenden Mächte verpflichten sich bis zur vollständigen Ausführung des Schiedsspruches (oder doch wenigstens während des ersten Monats nach dessen Fällung, als der kritischesten Zeit) Kritiken desselben in Druckschriften und öffentlichen Versammlungen nicht zuzulassen.

Kritiken in parlamentarischen Körperschaften sind von der Veröffentlichung ausgeschlossen.

Die vertragschliessenden Mächte verpflichten sich Zuwiderhandelnde zu bestrafen und die gegen das Verbot ausgegeben inländischen und ausländischen Druckschriften zu unterdrücken."

Eine Norm wie diese würde den Regierungen die Ausführung des Spruches erleichtern, indem sie Wi-

derstände gegen dieselbe vermindert. Sie wäre besonders wichtig für Fälle in denen die ökonomischen Interessen einflussreicher Kreise der Gesellschaft berührt sind, die alles in Bewegung setzen werden um die öffentliche Meinung gegen die Ausführung einer ihnen ungünstigen Entscheidung aufzuhetzen. Die Geschichte des Alabama und Alaska Schiedsspruches zeigt, dass sie auch für andere Fälle von Nutzen sein könnte.

II. *Der internationale Verständigungsrat.*

Art. 1. (87) Der Verständigungsrat besteht aus den von den vertragschliessenden Mächten ernannten Mitgliedern.

Jeder Staat ernennt mindestens 4 und höchstens 6 Mitglieder für die Dauer von je 6 Jahren. Zwei Monate vor Ablauf dieser Zeit erfolgen die neuen Ernennungen. Wiederernennung ist zulässig.

Diplomaten des aktiven Dienstes, Mitglieder des Schiedsgerichtshofes und des Oberprisengerichts können nicht zu Mitgliedern des Verständigungsrates ernannt werden und auch nicht dessen Mitglieder bleiben.

Art. 2. (90) Der Verständigungsrat wählt mit Stimmenmehrheit seinen Präsidenten und 2 Vizepräsidenten für je 3 jahre.

Bei dieser Wahl hat jeder Staat nur eine Stimme. Das stimmberechtigte Mitglied wird von seiner Regierung bezeichnet.

Zur Giltigkeit der Wahl ist mindestens $^{1}/_{2}$ der abgegebenen Stimmen notwendig.

Bei gleicher Stimmenzahl entscheidet das Los.

Art. 3. (—) Der Verständigungsrat wählt ferner für die Dauer von 6 Jahren ein ständiges Kommite von.... Mitgliedern die die diplomatischen Privilegien geniessen.

Der Präsident und die beiden Vicepräsidenten sind von amtswegen Mitglieder dieses Kommites.

Die Mitglieder des Kommites müssen alle ihrer Staatsbürgerschaft nach verschiedenen Staaten angehören und von verschiedenen Staaten bestellt sein.

Die 3 letzten Absätze des Art. 2 finden Anwendung.

Art. 4. (—) Ersatzwahlen in die ständige Kommission erfolgen innerhalb eines Monates durch schriftliche oder telegraphische Abstimmung.

Die Bestimmungen des Art. 2 Abs. 3—5 finden Anwendung. Die Verständigung von der Abstimmung erfolgt durch die nächstgelegene niederländische oder schweizerische Gesandtschaft. (Generalkonsulat wenn der Berechtigte nicht persönlich abstimmt.)

Art. 5. (—) Die Mitglieder des ständigen Komites haben ihren Wohnsitz im Haag.

Art. 6 bis 10. Bestimmungen über Gehalte und Diäten, Geschäftsordnung, Kanzlei, Präsidialberichte.

Art. 11 (93) Prinzipiell alle Verhandlungen im Haag, Ausnahmen zulässig.

Art. 12. (—) Nach Ablauf der 3 jährigen Funktionsperiode des Präsidiums treten die zur Stimmabgabe berufenen Mitglieder zu dessen Neuwahl im Haag zusammen.

Art. 13. (—) Die Vereinigten Staaten von Amerika, die Niederlande, Norwegen, Spanien und die Schweiz, für den Fall, dass diese Staaten dem Vertrage beitreten, bestellen durch übereinstimmenden Beschluss einen Generalsekretär und zwei Sekretäre auf Lebenszeit.

Diese sind berufen die Protokolle der Verhandlungen zu führen.

Bei Antritt ihres Amtes leisten sie ein feierliches Gelöbnis.

Sie haben ihren Wohnsitz im Haag.

Von der Protokollführung im einzelnen Falle sind diejenigen ausgeschlossen, welche einer der Parteien angehören.

Für den Fall des Erfordernisses bestellen die in Abs. 1 bezeichneten Mächte zum Voraus fünf stellvertretende Sekretäre für die Dauer von 6 Jahren. Diese werden im Falle des Erfordernisses einberufen und leisten bei Antritt ihres Amtes das Gelöbnis.

Art. 14. Bestimmungen über Gehalte der Sekretäre und Diäten der stellvertretenden Sekretäre.

Art. 15. Spätestens 1 Monat nach Ablauf der 6-jährigen Wahlperiode treten alle Mitglieder des Verständigungsrates zu einer Vollversammlung im Haag zusammen um die Wahlen des Präsidiums und des ständigen Kommites vorzunehmen.

Art. 16 (98) Die vertragschliessenden Mächte sind verpflichtet alle Streitigkeiten, zwischen ihnen, zu deren Schlichtung nicht bereits ein Schiedsgericht tätig ist, dem internationalen Verständigungsrat zu

unterbreiten, damit dieser sein Gutachten erstatte und seine Ratschläge erteile.

Art. 17 (99) Die Aufgabe, das Gutachten zu erstatten und Ratschläge zu friedlicher Beilegung der Differenzen zu erteilen, kommt einer Kommission von 5 Mitgliedern des Vermittlungsrates zu, die die diplomatischen Privilegien geniessen.

Je eines dieser Mitglieder wird von den beiden Parteien aus der Zahl der von ihr selbst bestellten Mitglieder des Vermittlungsrates gewählt.

Je ein weiteres Mitglied wird von jeder der beiden Parteien aus der Zahl der von einer anderen Macht bestellten Mitglieder des Vermittlungsrates gewählt.

Das 5. Mitglied, welches den Vorsitz führt, wird von den Parteien durch übereinstimmende Wahl bestellt.

Kommt diese Wahl innerhalb eines Monates nicht zustande, so wird der Obmann vom ständigen Kommite durch Stimmenmehrheit gewählt.

Jede der beiden Parteien hat das Recht die Mitglieder von .... Staaten von der Wahl des Obmannes auszuschliessen.

Art. 18 (—) Sollte eine der vertragschliessenden Mächte es ablehnen auf Verlangen einer anderen der vertragschliessenden Mächte wegen einer zwischen ihnen bestehenden Differenz sich entweder vor dem Schiedsgerichtshofe oder vor dem Vermittlungsrate einzulassen, oder sollte sie es versäumen innerhalb eines Monates ihre Vertreter für die Kommission des Vermittlungsrates zu ernennen, so werden diese Mitglieder für die betreffende Partei vom ständigen Kommite ernannt.

Die Wahl dieser Mitglieder durch das ständige Kommite erfolgt durch Stimmenmehrheit.

Zur Gültigkeit der Wahl ist mindestens $^1/_2$ der abgegebenen Stimmen erforderlich.

Die Wahl des Obmannes erfolgt in diesem Falle nach Art. 17 Abs. 5 und 6.

Art. 19 Die Dauer der Verhandlung vor dem Vermittlungsrat ist auf ein halbes Jahr begrenzt, wenn nicht die Parteien durch Vereinbarung diese Frist verlängern.

Die Verhandlungen beginnen, sobald der Präsident der Kommission bestellt ist, ohne Verzug.

Art. 20. Die Parteien sind in der Kommission durch Spezialgesandte und Anwälte vertreten.

Die Mitglieder des Schiedsgerichtshofes und des Oberprisengerichts dürfen zu dieser Aufgabe nicht bestellt werden.

Die Spezialgesandten und Anwälte haben die Interessen ihres Staates durch mündliche Ausführungen und durch Vorlage von Schriftstücken zu vertreten.

Art. 21. Die Verhandlungen leitet der Präsident.

Art. 22. Die Vertreter der einen Partei haben das Recht an die der anderen Fragen zu stellen und sie um Aufklärung zu ersuchen. Dasselbe Recht hat der Präsident.

Die befragte oder ersuchte Partei ist nicht verpflichtet zu antworten oder dem Ersuchen stattzugeben. Die Weigerung wird im Protokolle vermerkt.

Art. 23 Jedes von der Partei vorgelegte Schrift-

stück muss der Gegenpartei in beglaubigter Abschrift vorgelegt werden.

Art. 24. Die Verhandlungen finden im Gegenwart der Vertreter beider Parteien, unter Ausschluss der Oeffentlichkeit statt, wenn nicht beide Parteien mit ihrer Oeffentlichkeit einverstanden sind.

Art. 25. Das ständige Kommite ist berechtigt eines seiner Mitglieder als Friedensanwalt zur Teilnahme an den Verhandlungen, nicht aber an der Abstimmung, zu entsenden. Der Friedensanwalt geniesst die diplomatischen Privilegien.

Der Friedensanwalt hat das Recht, Fragen zu stellen und um Aufklärungen zu ersuchen. Die befragte oder ersuchte Partei ist nicht verpflichtet, zu antworten oder dem Ersuchen stattzugeben. Die Weigerung wird im Protokolle vermerkt.

Zur Wahl des Friedensanwaltes ist mindestens zwei Drittel aller abgegebenen Stimmen erforderlich.

Art. 26. Ueber die Verhandlungen wird ein eingehendes Protokoll geführt, das von den Mitgliedern der Kommission, vom Generalsekretär (ausser wenn er einer der Parteien angehört) und von den fungierenden Sekretären bezw. Sekretärstellvertretern authentisiert wird.

Art. 27. Nach jeder Sitzung verfasst die Kommission einen Auszug aus diesem Protokolle, der von den in Art. 26 bezeichneten Personen authentisiert wird.

Den Parteien steht es frei, diesen Auszug zu veröffentlichen. Die vertragschliessenden Mächte verpflichten sich, andere Mitteilungen über die Verhandlungen als das Protokoll oder diesen Auszug nicht

früher als 30 Tage nach Gestattung des Gutachtens zu erlauben.

Kritiken dieses Berichtes in Druckschriften, oder öffentlichen Versammlungen sind bis nach Ablauf der 30tägigen Frist nach Erstattung des Gutachtens verboten.

Kritiken in parlamentarischen Körperschaften sind innerhalb dieser Zeit von der Veröffentlichung ausgeschlossen.

Zuwiderhandlungen sind zu bestrafen.

Inländische und ausländische Druckschriften, die diesen Verboten zuwiderlaufen, sind zu unterdrücken.

Art. 28 Abberufung von Kommissionsmitgliedern durch die sie ernennende Partei ist unter gleichzeitiger Ernennung eines Ersatzmannes aus der Zahl der Mitglieder des Verständigungsrates gelässig. Der Ersatz ausfallender Mitglieder der Kommission erfolgt innerhalb einer Woche in derselben Weise, in der das zu ersetzende Mitglied bestellt worden war. Im Falle der Versäumnis dieser Frist bestellt das ständige Kommite den Ersatzmann.

Abberufung des Obmannes ist unzulässig.

Art. 29 Zu einem Gutachten und zu Ratschlägen, die als solche des Verständigungsrates gelten sollen, ist Stimmeneinhelligkeit der Kommission notwendig.

Das Gutachten und die Ratschläge werden vom ständigen Kommite den Parteien mitgeteilt und 24 Stunden später veröffentlicht. Gelingt es nicht, Stimmeneinhelligkeit zu erzielen, so werden die Gutachten

und Ratschläge der einzelnen Kommissionsmitglieder vom ständigen Kommite mitgeteilt und veröffentlicht.

Die Regierungen der beteiligten Staaten dürfen die abgegebenen Gutachten und Ratschläge nicht gesondert, sondern nur in ihrer Gesamtheit veröffentlichen. Sie sind verpflichtet auch die private Veröffentlichungen abgesonderter Gutachten und Ratschläge zu bestrafen und zu unterdrücken.

Art. 30. Innerhalb der ersten 30 Tage nach Erstattung des Gutachtens beziehungsweise der Gutachten ist dessen Kritik in Druckschriften und öffentlichen Versammlungen verboten Art. 27 Abs. 4—6 finden Anwendung.

Art. 31. Die Gutachten und Ratschläge binden die Parteien nicht. 30 Tage, nachdem entweder das Gutachten des Vermittlungsrates, oder die Gutachten und Ratschläge der einzelnen Mitglieder der Kommission vom ständigen Kommite veröffentlicht worden sind, erhalten die Parteien volle Freiheit des Handelns.

III. *Sanktion.*

Art .1. Die vertragschliessenden Mächte verpflichten sich, wenn ein Vertragstaat gegenüber einem anderen, die ihm nach Art. III obliegende Pflicht verletzen sollte und sich weder vor dem Schiedsgerichte, noch vor dem Vermittlungsrate einlassen würde,

1. alle etwa mit ihm geschlossenen Allianzverträge als aufgehoben anzusehen,

2. ihren Untertanen jede Art der Unterstützung jenes Staates während des Krieges zu verbieten,

3. ihren Untertanen jede Art der Unterstützung von dessen Gegner während des Krieges zu gestatten,

4. von dem vertragsbrüchigen Staate jeden Ersatz des durch den Krieg ihnen oder ihren Angehörigen erwachsenen Schadens nach Beendigung des Krieges zu fordern.

Art. 2. Die vertragschliessenden Mächte sind bereit, im Falle, dass eine diesem Vertrage nicht beigetretene Macht gegen eine andere, sei es, dass diese diesem Vertrage beigetreten wäre oder auch nicht, Feindseligkeiten eröffnet, ohne die Differenz vorher der Vermittlung anderer Mächte oder einem dem internationalen Vermittlungsrate analogen Organe unterbreitet zu haben, gemeinsam die Frage zu erwägen, ob sie auch diesem Staate gegenüber das in Art. 1 bezeichnete Verhalten einschlagen sollen.

In dem Falle, dass ein übereinstimmender Beschluss hierüber nicht zustande kommen sollte, behält sich jede der vertragschliessenden Mächte das Recht vor, für sich allein oder mit andren Verträgsmächten zusammen in der in Art. 1 bezeichneten Weise gegen jenen kriegführenden Staat vorzugehen.



VI. SANCTION INTERNATIONALE

AN INTERNATIONAL POLICE

BY

BARON E. PALMSTIERNA, SWEDEN.

The present chaotic state of our laboriously erected system of International Law has enforced a revision of the views prevailing within large pacifist circles. Formerly people were completely absorbed in the more immediately pressing work of creating „model treaties", and extending the structure of the International Law on historical foundations. They seemed to expect that the peace agitation would by itself strengthen the efficiency of the means of justice, and that peace would thereby be secured.

But, when the crash came, and the efforts of many decades came to nothing, every one saw in the intense light of events that what was needed was something more than bridges between the peoples which they might use if they wished to associate peaceably with one another. To be sure, it was all very well and good that technical possibilities for the peaceable settlement of questions were placed at the world's disposal; but the essential thing — the maintenance of peace — was, as bitter experience showed, far from being assured by that. For that purpose something more was needed: it was required that economic administration, at least that of most of the leading Powers, should have proceeded so far that the demand for peace should

reign supreme; and moreover that those who were striving for peace should have power enough to prevent anyone who was going to break peace, from his work of destruction, so that a whole continent might not be involved through him in the evils of war.

In a previous essay called „A Lasting Peace" (1915) I have mainly dwelt upon the question how „the productive forces should be brought to serve mankind and contribute to mutual understanding instead of causing war"; I shall now pass over that question, and take up instead a problem which was previously kept in the background, but which now, owing to the course of events at the outbreak of the war, has forced itself to the front, viz. the question *„how States, which have become ripe for an absolute maintenance of peace, be able to prevent a disturber of peace from spreading devastation all around?"*

This latter question is nowadays the most debated one in pacifist circles which earlier did not dare to go deeply into the problem. Influenced by the horrors of the war, people are now prepared to go very far, as it seems, in their efforts to deter governments from martial enterprises when once the present war is brought to an end, and there remains only the melancholic memory of the madness of Europe. But the solution of the problem is not really so simple as that, and history shows how pitifully earlier attempts in that direction have failed. Neither Napoleon's idea of creating a „pax romana" through the supremacy of one single Power, nor the royal promises of the Holy Alliance a hundred years ago succeeded in bringing us nearer the

longed-for state of things. Persons who are now occupied with the problem also are wondering whether the *peoples* themselves have energy and presence of mind enough, and whether their need of peace has grown so firm that they really have power to overcome the difficulties, and whether they are able to achieve *the judicial security* without which written laws are of no value.

Evidently the problem resolves itself into two parts. The first concerns the question how it can be settled *who is the disturber of peace*, or who shows a tendency to break the peace; and the other one concerns the question how the States, after this first matter has been proved, can *ward off any breach of peace.*

The first point is of so much greater interest as it hides in itself the much discussed question: *is it possible to draw a clear line of distinction between an aggressive war and a defensive one?*

The second question opens up a great many problems of practical politics and a great many theoretical questions in International Law. If there should be formed a supreme court which shall hold each several state bound by its decision, what will then become of the sovereignty of the state? Will not the state be reduced to a mere tributary state without the independence that is required for its prosperity? And what shape should such a supreme court assume? Its composition is of the highest interest if this institution be invested with the power to interfere decisively in the differences between nations. The question will also be raised whether peace is to be preserved *only* by „*peace-*

ful" means, or whether it is to be presumed that *force* may be used. How should arms in one case or the other be managed against the possible disturber of the peace? Are the States to take up arms in common at the request of some police authority, or is it that the means of pressure should be directly exerted by such an authority itself, and be at its disposal even in time of peace?

These are complicated questions that at once arise when the problem is taken up for critical examination. For that reason it is very important to discuss the matter, and that the whole problem without preconceived opinions could be looked at from different points of view.

IS THERE ANY POSSIBILITY OF DISTINGUISHING BETWEEN AGGRESSIVE AND DEFENSIVE WAR?

It must be made clear at the outset what progress was made, before the world-war, with the work on the two questions that are the subject of this essay.

As regards the problem of establishing who is the disturber of the peace, this matter has not, so far as I know, been directly investigated; but with the aim of avoiding premature outbreaks of war, machinery has gradually been devised to settle disputes in a peaceable way, which is such that a mere refusal to employ it is a reason to consider the refusing State a possible disturber of the peace. Here above all I have in view the so-called treaties of 1913, upon which I wrote an article in the Swedish periodical „Tiden", June, 1916. It might be well, however, to recall in memory Art. 1 of the treaty between Sweden and the United States of

America of Oct. 13, 1914. There it is said: „Any disputes arising between the Government of the United States of America and the Government of His Majesty the King of Sweden, of whatever nature they may be, shall, when ordinary diplomatic proceedings have failed and the High Contracting Parties do not have recourse to arbitration, be submitted for investigation and report to a permanent International Commission constituted in the manner prescribed in the following article. The High Contracting Parties agree not to resort, with respect to each other, to any act of force during the investigation to be made by the Commission and before its report is handed in." The members of the Commission were appointed in 1915.

Certainly, there is fully satisfactory reason to maintain that the country which declines to concur in the conclusion of such a reasonable treaty as this one and to observe its regulations ought to be considered a possible disturber of the peace.

Within the Society of Nations it is well known what is to be expected under the conditions supposed. Already in time of peace attention must be directed to any one who is unwilling to enter into a universal treaty of the nature described, and measures be prepared.

If a dispute has been referred to the Commission of Inquiry, which is to make the facts of the case clear to an expectant world, sufficient light would thereby be thrown on the question whether it is impossible to settle the dispute otherwise than by force. If the judicial method is practicable and the proposal of conciliation acceptable, but one of the Parties be unwilling to

comply with it, the latter thereby condemns himself as a disturber of the peace.

To this it may possibly be objcted that the best armed Power, the one which, at the time when the dispute arises, has the start of the other, is unwilling to await the result of the Commission of Inquiry, for in that case he would give the adversary a possibility to get ready. Some people would thus explain Germany's attitude during the fatal days of August 1914 with regard to Sir Edward Grey's proposals for a Conference. But this remark only shows that the inclination to preserve peace on the part of a Government, that holds such an opinion, is not strong enough to be able to make the utmost exertions to avoid the conflagration.

The conclusion is, then, that if a nation is unwilling to enter into any sort of „1913-treaty", or if at the critical moment it breaks its agreement, its position as an aggressor is evident.

If a difference has arisen between states which are bound by arbitration-treaties, as well as by the treaties just mentioned, and if one of the Parties declines to submit to the award — a thing which is not likely to happen, because states are wont to submit to arbitration only such questions as can be solved in that way, and the arbitration-treaty presupposes the award being obeyed — we also know who the culprit is.

It seems to me, therefore, that it may be said that the development before the war *) has brought us so

*) It may here be noted that the Central Powers, Germany and Austria-Hungary, are the only Great Powers which had not concluded any „1913—treaty".

far that we really have considerable technical possibilities to indicate the disturber of peace.

The objection that the states might provoke one another into acts of violence in such a way that the state which, from the technical point of view of International Law, must be considered the aggressor is in reality the injured party, and that consequently no absolutely just judgment could be obtained, whatever may be written on paper — this objection will not bear a close examination. In reality it strikes at *all* judicial action between individuals as well as between states. If anyone has used violence with the courage of despair or with the feeling of acting in self-defence, he will be judged more leniently; but in the judicial proceedings involved by the dispute the party that struck the first blow will be considered the *starting-point* for the cognizance of the cause. In international life the procedure must be the same as between individuals.

In June 1913, I wrote in *Tiden* that we could discern the „first faint outlines of a *judicial authority* for the world-community appearing" with the Hague Court, but I also stated that the *legislative authority* and the *executive organ* were still lacking. „As time goes on", I added, „and in the same degree as the indispensable social and economic conditions develop towards maturity, however, these will certainly take shape as naturally grown organs in the mundane commonwealth". Little could it be thought at that time, however, that among the friends of peace the latter

question would before long come to hold a central position in the discussion which could not be reduced to silence even by the din of war.

EXISTING TREATY-STIPULATIONS.

We shall now see to what degree the conventions of recent years show any traces of collective intervention with anticipated possibility that joint action on the part of the signatory powers may be required for the enforcement of the conventions.

The existing examples hereof refer to Norway and Sweden and the Pacific Ocean. In the Treaties of Neutrality regarding Luxemburg and Belgium it is only said „respect and make respected" (respecter et faire respecter); but the Norwegian *Treaty of Integrity* of 1907 and *the North-Sea and Baltic Treaties* of 1908 go a step further. In the latter it is said: „Dans le cas où d'après l'opinion d'un des Gouvernements désignés ci-dessus le statu quo territorial actuel dans les régions limitrophes de la Mer du Nord serait menacé par des événements quelconques, les Puissances signataires de la présente Déclaration entreront en communication pour se concerter, par la voie d'un accord à conclure entre elles, sur des mesures qu'elles jugeraient utile de prendre dans l'intérêt du maintien du statu quo de leurs possessions".

The North-Sea Treaty is so far different, in that it stipulates that the discussion shall have in view the reaching of „an agreement regarding the measures" &c. The Norwegian Treaty differs from the Swedish

ones partly because the integrity is guaranteed as well as the territorial status quo, partly because it is Norway itself that shall require the support of the Powers if its integrity is menaced.

In the agreement of Nov. 30, 1908, between *Japan* and the *United States of America* it runs thus: „Si quelque événement menaçant le statu quo ainsi décrit se produit, il resterait aux deux gouvernements à entrer en communication l'un avec l'autre, afin d'arriver à une entente sur les mesures qu'ils pourraient considérer comme utiles à prendre".

These declarations thus presume that the signatory powers have undertaken a liability to see to the effectiveness of the agreement reached and its safeguarding in case there should arise any risk of its being attacked.

As regards the special *peace legislation* there will be found in the Hague conventions some stipulations which at least touch on this question. Thus, the arbitration treaty of 1907 presumes no execution to be needed since it is stipulated in § 37 as follows: „Le recours à l'arbitrage implique l'engagement de se soumettre de bonne foi à la sentence."

Another stipulation is found in § 3 of the convention about warfare on land, where is said: „La Partie belligérante qui violerait les dispositions dudit Règlement sera tenue à indemnité, s'il y a lieu. Elle sera responsable de tous les actes commis par les personnes faisant partie de sa force armée."

Here therefore there is presumed the possibility of exacting „fines" for any „breaches of the law" that may have taken place.

PEACE, NOT DEFENCE — NIHILISM.

On studying what has been hitherto done one gets the impression that it is but feeble groping without any real grip of the matter; but after the outbreak of war it was otherwise. The actual force of events now compelled an eager discussion how International Law should be vindicated. The necessity not to trust solely in the gradual progress of humanism among mankind, and not to believe that everything could be set right by an enlightenment that alters man's state of mind was sharply emphasized in the face of all what happened in 1914. *Might* must exist in the international as well as in the national community, in order to defend right and prevent outbreak of violence. There has never been any human community which has not been obliged to compel its members to obey the laws. *Might in the service of Peace* has become the watchword; and people have decidedly set themselves against the degenerate „pacifism" which would rather see the states involved in war than put arms into the hands of an International police whose exclusive object is to guard peace. It is no longer possible to understand the friends of peace who, in the spirit of Quakers, will not take a weapon in their hands even if by that means the most precious thing of all — Peace — can be secured. People are now emancipating themselves from the fatal confusion that *Disarmament* should be the aim, when in reality this is Peace. They are now sensible that a peace-willing nation, if it has disarmed *before* a universal peace is secured, by such action reduces the chance of bringing

about the joint armed defence which has become quite indispensable for those who are firmly resolved to secure peace in common, and restrain the disturber of peace.

It would constitute a serious lack of solidarity towards society of nations if a state, be it great or small, should refuse to defend the world — with armed force, if needed, together with other peace-willing states — from the desolation that can be spread abroad by nations which have not attained to the level of civilization, reached by those who wish for Peace.

But if Peace is first secured, then the general reduction of the burden of armaments will follow as a logical corollary.

POINTS OF VIEW AS REGARDS THE INTERNATIONAL PUBLIC ORGANS.

For us in Sweden it is probably easier than for many others to discern the constitutive defects in some of the before mentioned proposals. To us, with our exceedingly well balanced constitution, a distinct delimitation of the different departments of administration with regard to their special tasks is quite natural; and our great wish is to get something corresponding to this in the sphere of a future society of nations. Our own history has given us ample experience of the fact that care must be taken not to mix functions improperly. We distinguish strictly and with advantage between the *legislative*, the *judicial* and the *executive* power. Now that the ground-plan for the spheres of activity of the public organs of society of nations is to be drawn

— and it is nothing more or less than that with which some people are occupied, hoping that the Future may harvest what the Present sows — it is highly important to preserve, for the higher form of society, the benefits which the political life of the West has gained from the speculations of political science and constitutional social activity since the days of Montesquieu.

THE FRAMING AND ADMINISTRATION OF LAW.

To begin with, it is important to ensure the growth of an independent *International Legislative Body.* We have an embryo in the Diplomatic Conferences which were held at The Hague in 1899 and 1907. Proposals for their periodical recurrence, without requiring the initiative of any state whatever, have proceeded from various quarters; and the Interparliamentary Union, which in 1912 appointed a commission for the investigation of the matter, has for the purpose communicated with the „Administrative Council" of the Hague Court. Certain steps had been taken for summoning a third Conference and the appointing of national commissions *) the year before war broke out, and the work consequently came to nothing.

It is evident, however, that work on International Law can never cease. It must go on incessantly, taking impulses from the changes in international life. New problems, changed technique, the development of commerce, all require continual legislation.

*) In Austria, Belgium, China, Denmark, Germany, Italy, Japan, the Netherlands, Norway, Russia, Sweden, Switzerland and the United States of America.

Indeed, the accommodation of International Law to the requirements of life is the *sine-qua-non* for its real importance. But this in turn makes it necessary that the existence and the efficiency of the Legislative Body should be secured. We need to bring about not only the regular recurrence of the Hague Conferences with only a few years intervals — which is moreover insisted upon in the final act of the Conference in 1907 — but also a standing committee to draft legislation, which shall investigate beforehand the proposals laid before it, either by states or by private institutions, and which shall itself put forward propositions, and follow the general course of jurisprudence. It is strange that Mr. *La Fontaine* raises objections to a permanent preparative commission of this kind, and prefers to go on with the national commissions; but the one thing must not displace the other. Legislative business alone and nothing else ought to be the function of this branche of the International administration.

The creation of an independent Supreme Court and a permanent Judicature, appointed exclusively in the service of the International judicial society must likewise be secured. On that point people would seem to be completely agreed on all sides; and the task before us would seem to be limited in the main to making the Hague Court permanent, and to its extension by sections or chambers forp ronouncing judgments on cases of different kinds. Private law ought to be separated from International law, which concerns states, and the latter should be specialized in a suitable manner. But here, it seems to me, it must be strictly laid down that

the court shall exclusively devote itself to pure questions of law and *judicial* matters. All questions with any political features must strictly be separated from these. It would be a misfortune if the task of a Commission of Inquiry and of Conciliation should be removed to the Hague Court, as is at times recommended, for instance by Mr. *La Fontaine.* On the contrary things must be so arranged that the cases are ready to pronounce judgment upon when they are referred to the Court; and that court should not even have the task of performing the preliminary investigations. Thus, the utmost pains should be taken that the authority of the Court should not be impaired by undertaking anything that could lead to negotiations between the Parties. Otherwise political points of view might easily be brought into the foreground, thus entangling the administration of justice.

CONCILIATION ORGANS.

Side by side with the Supreme Court, and quite independent of it, there ought to be a permanent Institution for Inquiry and Conciliation. In reality, that is a necessary antecedent condition for the development of the treaties of 1913 into the general and uniform convention to which all the states in the world ought to accede. The creation of a permanent, well-organized and adaptable Institution of Conciliation would involve a unification of the treaties. Far more easily than the multitude of very differently constituted small Commissions of Inquiry contemplated by the

existing treaties, the International organ could secure both the requisite authority and procedure and rule-forming precedents.

As a matter of fact a development of the system of Commissions of Inquiry and Conciliation in this direction means an adhesion to the system of Conferences we have inherited from the past century. But there is one important difference. Whereas the Diplomatic Conferences were at best expressions of the collective views of the Great Powers, and were not unfrequently mere instruments for the intentions of one group of Powers, now all the Powers would be represented, and the work would no longer be left to temporary *ad hoc* diplomatic conferences. Instead of these there would come into existence a permanent comprehensive organ, the sole task of which it is to investigate international differences, and to submit proposals for settling them by conciliation, unless the case proves to be of such a nature that it must be referred to the Supreme Court for arbitration, and the Parties agree to that.

It may be practical, as is proposed by Mr. Hobson, to have a special commission, composed of delegates from both the institutions mentioned; which commission has to settle at the outset whether a case is to be submitted to the Court or to the Institution of Conciliation.

It may well be questioned, however, whether any *mediation* in a proper sense of the term should form a part of the tasks of the Institution of Conciliation. For mediation always tends to get a political colour, however much an avoidance thereof may be attempted;

and it is important that the proposal of conciliation should be unaffected by political interests at least at first, and so should, by its material strength and strong impartiality, be supported by general opinion, which is an indispensable factor in the preservation of peace in the event of differences arising. Thus, I strongly incline towards the opinion that the Institution of Conciliation should be free and independent in relation to the special states and their exertions for mediation.

The course of proceeding in the treatment of any case, therefore, is that it is either directly referred to the Supreme Court in accordance with the valid arbitration treaty for the settlement of the legal question or, if it clearly cannot be regarded as a legal question, it is referred to the Institution of Conciliation in accordance with the actual 1913-treaty. This last either takes up the case, or on condition that the Parties concerned give their consent, hands it over entirely or partially to the Supreme Court.

Now, however, there might arise several eventualities, which make it necessary to have further means at disposal. One Party might perhaps not be willing to take the way provided by the treaties, or it might refuse to submit to the award of the Supreme Court, or finally it might not accommodate itself to an arrangement proposed by the Institution of Conciliation, though public opinion may find it quite reasonable.

The security and the observance of the laws must in the Society of nations be safeguarded under all circumstances.

Here we come to the Police Authority, the executive

power that the world needs. This body should evidently take over another part of the task which the system of conferences on certain occasions has tried to perform. It must try directly to mediate when other agencies fail, and, if that does not succeed, it must make use of its right to employ force. There can be no question here of any „world-government" with all manner of intervention policy that is associated with this word. Nor must the Police Authority have the character of any „trust of the Great Powers", against which Mr. La Fontaine has forewarned us in the Belgian Senate. Small powers as well as great ones must support the Police; and both of the now fighting groups of Powers must jointly and separately back it, or it cannot attain the necessary authority.

Before I proceed to give some points of view regarding the composition and competence of the organ in question I must remind the reader how important it is that the activity of the organ should be set in motion by some fully impartial authority. Thus it is an institution which is at the same time the *guardian of the laws* and the *public prosecutor.*

THE RIGHT OF PROSECUTION.

In Sweden we have the Institution, peculiar to our Constitution, of the Attorney-General of Justice, appointed by the Parliament. This institution may in some respects be compared to the international authority the necessity of which I am suggesting. The thought of transferring the institution to the Society of

nations has been set forth in the Swedish Parliament by Mr. *Edward Wavrinsky*, and the Swedish barrister Mr. *Eliel Löfgren* has given a full elucidation of the subject in a publication, published by the Swedish Interparliamentary Group after the postponement of the Conference of the Interparliamentary Union which was to have been held at Stockholm in 1914. His article has been translated into four of the worldlanguages.

As a constituent part of the system of state administration we are now going to sketch, there ought to be included, as it seems, a corresponding institution, with the duty *partly* to watch the course of the events and to protest against violations of International Law, *partly*, if needed, to „prosecute" the blamable party and subject him to the measures of repression, which the Police Authority may find necessary if mediation should not succeed, *partly* to draw the attention of the Hague Conferences to any existing obscurity or to the need of amendment in the code of International Law.

Especially when the political power may be needed for the preservation of peace, it is, I must mention, of extraordinary importance that nobody who might, in certain eventualities, be „party in the case" should take the initiative in mobilizing the political power. Mutual rivalry and suspicion might in such cases complicate the situation instead of clearing it up. For that reason the initiative must be taken by some institution independent of the separate states, and be assigned to a previously organized international authority, which should in such a case, immediately be set in motion.

In this way also the need of promptness in action is

provided for, which experience has shown to be necessary during critical hours. Diplomatic red tape, the multitude of persons which are to be set going, and the difficulty of delivering messages, all place such obstacles in the way that the methods hitherto employed to bring about general political deliberations in critical moments must be abandoned. Precious time will be saved if the initiative to the collective action of the states is concentrated in one single hand, and this is *directly* connected with all the governments, or, still better, with their collective permanent organ.

Sir Edward Grey has given, on the 12th of August, 1913, a vivid description of the working of the present diplomatic system. Evidently, better arrangements must be made.

AN INTERNATIONAL COUNCIL.

The most delicate problem, however, is the form that is to be assumed by the Police Authority which is intended to be the ultimate safeguard of peace.

The first question would seem to be this: whether the Police Authority ought to be quite isolated from the individual state system, and whether it is to consist of a special international institution having the right to control the actions of the individual states, and having at its entire disposal all the means that might be needed for exercising the duties of a Police, including, that is to say, an army and a navy? In my opinion, anything of that kind is hardly practicable. That presupposes such revolutionary changes in the constitutions of the different states that the task seems to

have next to no chance. Let us suppose the blamable state to be shut off from communication with its neighbours. That can not be done in any other way than if these states *themselves* order their respective organs of administration to carry out what is required for this purpose, whether on request from without or not. An international institution can never be imagined as *directly* ordering an administration subordinate to a special state to execute commissions on its own behalf. There is always required the acquiescence of the government of the state concerned. Examples could easily be multiplied, which show that the antecedent condition for investing an independent international organ with the requisite instruments of power is that such a fusion of the nations should have taken place as we neither see being realized at this very moment, nor find especially desirable.

The only possibility then, is, that the states independently work together by agreement for the preservation of peace, but that they do this in accordance with a scheme settled in advance, and with the support of a permanent organ created for the purpose, which has the qualities and competence of a *Council*.

Now it is evident that the creation of a Council of this kind and the accession of states to the convention which delimits its functions, involves rather drastic changes in the laws in some states. The fact is, that several of them have fundamental or constitutional provisions as to the use of the military forces, and in that case this use is limited, as a rule, to the defence of the realm, and it is prohibited to take the military forces

out of the country. The new purpose for which the military forces might possibly be employed is consequently to involve amendments in the fundamental law of these States. Furthermore, it may be supposed that the Government not is clothed with such an economic-administrative authority — for instance, the power of forbidding certain lending transactions and intervention regarding the issue of bonds and shares etc. — as the new order of things requires. It must also be borne in mind that new clauses might be needed in commercial treaties, already concluded, where also the cooperation of the legislature is necessary.

From what has been said, therefore, it may be understood that the new arrangement could hardly be brought about without joint resolutions by Government and Parliament in different States.

The Council will, to be sure, have a most delicate task, and its own functions will be of a political nature. Conflicting interests could never be kept out from the Council-chamber when decisions about the use of force were to be adopted. It is, therefore, far from being without importance to find the most convenient method for making *decisions* in the Council. In proportion as the technical solution of this problem might have the effect that the decisions should give expression to the opinion which in reality represents the world, without any State being unnecessarily violated, so much the better would it be for the Body itself. The Body could thereby obtain an increased authority that was not given to it at first and which would be increased by prescription.

This problem has already caused much trouble. Always when there has been proposed any real representation for the States with power of decision, we have been brought to a standstill before the weighing of votes and the procedure of voting. Within the Interparliamentary Union this question has become urgent as a necessary condition for the performance of its work with more method; and a special commission, with Mr. La Fontaine as its chairman, had — just at the time of the outbreak of the war — the task of trying to find an acceptable solution. A scheme with this same object has also been propounded by Professor Quidde, but it has not received any close scrutiny.

The Hague Conferences too were forced to go deeply into the problem. At the second Diplomatic Conference the proposal to make the Arbitration Court permanent fell through owing to the insistence of the Small States on a right of representation equal to that of the Great States. In the same year (1907), however, when statutes were to be drawn up for the International Prize Court, the following apportionment of the votes among the members of that Court was agreed on: Austria-Hungary, England, France, Germany, Italy, Japan, Russia, und United States of America 20 votes each; Spain 12; the Netherlands 10; Belgium, China, Denmark, Greece, Norway, Roumania, Sweden and Turkey 9; Argentine, Brazil, Chile and Mexico 4; Bulgaria, Persia, Switzerland 3; Columbia, Peru, Serbia, Siam, Uruguay, and Venezuela 2; all the rest 1 vote each. As is well known, however, the Prize Court had

not yet got into working order by the time of the outbreak of the war.

The difficulty is, that it is extremely hard to put one's finger upon any rational index of the life-force and the real influence of a Nation. The number of the population will not serve, for then China would be preponderant; nor international commerce, for this would unduly favour, for instance, the transit-country, The Netherlands; shipping as a standard would give an undue preference to Norway, and so on. Nor could the Small States in common be allowed to balance all the Great Powers, which in reality dominate the whole globe. The resolution of the Hague Conference, however, shows that „where there's a will, there's a way". Worthy of consideration is the plan of the Fabian Society, to overcome some difficulties in the voting by dividing the Council into sections.

It would certainly be a mistake if the function of the Council should be limited only to preventing expected outbreaks of controversy. The necessity for its permanency might then, perhaps, be questionable, and the Council could not attain the contact with real life which its important work requires. It seems necessary, therefore, that the Council should be invested with the positive and fruit-bearing task of contributing in a most expedient way to the depelopment of the administrative, technical and economical organs, which should form the motive power in the work, indispensable for peace, which aims at surrounding the peoples of the earth with a network of interrelations and an ever-increasing community of interests. Alike in my

essay on „A Lasting Peace" and in a motion, submitted to the Scandinavian Section of the Interparliamentary Union in 1914, I have set forth that it is of the highest importance for the States to do everything they can in order to further this development; and to this end I have proposed some schemes of an organizative nature.

Here a rich field is opening for the projected Council, which attracts us to beneficent work. The world needs in fact an organ, devoting itself to unite the separate parts of the globe. The Council could be an organ of this kind. The constitution of the Society of Nations ought from the beginning to be built in a way that the Council automatically is to be the coping-stone and the supreme authority of the International Administration. With the normal development of the Administration the influence of the Council grows continually, and its authority gains in strength.

The Pan American Union may here be mentioned, and the increasing influence its Administration Council has acquired over the affairs of North and South America. It is recognized in all quarters how invaluable this institution set up by the States themselves has been.

THE MEANS OF COERCION.

If we assume that the Council has got to work, and, on initiative from the Prosecuting Authority, makes representations to the Powers, the question then arises what are the means that should, in fact, be used against a contumacious State. It seems a matter of course to those who have not reflected much on this

subject that the means must be of a traffic and economic nature, and involve the partial or total blockade of the contumacious State, No doubt such means might sometimes be effective enough, and they ought to come into use first. I will, for instance, recall to mind the fact that the drawing out gold from Germany by the French at the time of the *Agadir Crisis* in 1911 (*Fred och Krig*, page 25) contributed to the preservation of Peace; and during the present war China, by a well-organized boycott of Japanese articles, has forced its eastern neighbour to reserve certain onerous claims which might have lead to war. But such measures — as experience shows well enough, when *greater* Powers are concerned — are, in the first place, somewhat ineffective as a rule, and secondly they act extremely unevenly on the blockading States themselves, and finally economic means of coercion probably end some time or other in military movements, above all maritime ones.

For instance! Suppose that Germany showed a tendency to break the peace of the World, and measures against that State should take the form of boycotting its merchandise and stopping its traffic with other countries. The transit country The Netherlands would in that case come into a peculiarly critical situation, and a much heavier burden would be laid on that country than, for instance, on the United States of America. In Sweden there would almost certainly arise a great deal of unemployment in that Germany's reply would no doubt be the prohibition of import, say of timber, and prohibition on exportation regarding

machinery and parts of machinery, dye stuffs, etc., together with withdrawals of loans, enforced sales, and the like. Private persons in the blockading countries would suffer, the more so, the more intimate the connection were with the blockaded country in consequence of close neighbourhood and active commercial relations. If Denmark took part in the blockade, moreover, it would be easy enough for the mighty Germany in a few days to disable that militarily feeble State, upon which the boycott would thus have brought terrible sacrifices, while nothing like a corresponding burden would have been imposed upon Great Britain.

A Commission of inquiry appointed by the Anti-Oorlog Raad has drawn up a very interesting statement of its opinions on this problem. It contains an account of the way in which the question was previously treated, and the historical application of boycott or blockade. The different arguments which plead for and against their application as means of coercion are also carefully examined there.

Especially are there two points which make the Commission hesitate to support these means of coercion.

Thus, it is showed that the boycott might last a very long time, possibly even years, and the boycotting States would consequently be brought to great privations; the difficulties will spread, from the wholesale merchant to the retail dealer and the consumer, and damages are sure to be claimed, as time goes on. But how are they to be calculated; and what immense sums there will

have to be taken into consideration! If no damages could be obtained, then the inclination to evade the regulations would be too strong, and the boycott would gradually prove ineffective. Aware of this circumstance, the boycotted State will do all it can to prolong the crisis, that being evidently to its advantage.

It is further maintained that international trade will be greatly affected, if the boycott and the blockade are to be sanctioned means of coercion. Anxiety lest it should be applied against a State might induce that State, even in Peace time, to arrange its commercial connections — even though with a certain sacrifice — in such a way that it will be as independent as possible in the event that „the danger" arises. A large stock of certain important necessities would possibly be kept in the country. This would in its turn counteract the natural development of commercial life and restrain that interchange of commodities whose increase is generally considered to be a very active factor for the security of Peace.

These objections seem to the Commission to be of such great importance that it will not recommend a general boycott and blockade against a disturber of Peace. On the other hand, it is recommended to stop contraband under all circumstances.

To this may be added that the boycott and the commercial blockade not are likely to be kept up without the use of some form of military blockade, that is to say trusting to the assistance of the State to stop the supply of goods. This blockade presumes, as a rule, the use of warships, and thus arms glimmer on the horizon.

If a State wishes to protect itself against the blockade, it must repel the force of the blockade, and conflicts with it could scarcely be avoided under such circumstances.

Thus, it will be found that the so-called „peaceful" means to a large extent cut both ways, and in practice there must be a choice between two things: *either* exclusive trust in the gradual progress of civilization as the sole effective means, *or* the retention of military force as a safeguard of peace.

It is evident when one goes at all deeply into the question that we could not do without arms if we really wish Peace, and that it perhaps will be the easiest andsafest procedure to let the police authority, after a certain delay, immediately threaten with military measures. It would not be likely to come to fighting if the force of the Peace coalition is so overwhelming that there is no chance of resistance, and unity holds within the Peace Alliance in the time of its probation. As *Hamilton Holt* says, it is likely that „the certainty that a force will be used will mean that practically it never need to be used."

Is it then really possible to believe that the States in an emergency would follow the exhortation of the Council? Will there really be any greater safety for the securing of Peace if we have all this apparatus? The voices of doubt are heard and put forth strong, though not absolutely convincing, arguments. The states are not in a *static* condition, and their own internal life is full of matters of controversy; especially might be mentioned questions of nationality, and the Finlander

Professor *Erich* has set forth these in this very connection. It would not be right to keep the world in its present state by means of an international coercive authority. The situation of the oppressed would in that case be desperate. The life in the national state, moreover, is developing in a way which could not fail to concern other States, and call forth vital conflicts, which bring the world into periodical disturbance.

The sum of these objections is, that there is no possibility of preventing outbursts of violence whatever may be tried for the purpose.

The reminder about the non-independent nations is serious enough and goes to the bottom of all peace work, which takes the *State* as foundation for all law-building. But how else is it possible to act in the Society of Nations? International Law knows only societies with a government of their own: the others are inaccessible to International Legislation. Questions of nationality are matters of *political* controversy, and may in that capacity be subjects for the activity of the international organs of conciliation and administration. Before the nation has become a State — unless it prefers, like Austria-Hungary, to belong to a State of nationalities — no international legislation can be applicable to it. „The International Law has only to do with the States" justly remarks *Ödön Makai*. This does not mean any sanction of the present political condition of a state; it merely signifies a distinguishing of International Law from purely politic- constitutional questions. Work on the amelioration of International Law ought not to cease because the latter problems are not solved.

In the same degree as the world comes to be provided with special organs for the maintenance of Peace, better adapted for the purpose than the old conference-system, it must also be presumed to be easier than before to solve the problems of nationality. Nevertheless the Conferences effected a great deal during the past century; and a better arrangement is likely to do more for the efforts of the nations to liberate themselves. Nor can it be ignored that it is often through military reasons that the nationalities within a State are fettered. If these reasons vanish, the situation will be quite different.

The second objection deals with a false conclusion in the argumentation. It may be true enough that life itself calls forth the varied problems of life, and that these will not cease, so long as the peoples are living and struggling. But that does not mean that the *only* solution is war. No, it is answered, but as *ultima ratio* it remains nevertheless, however much legislation there may be. It might be difficult from a theoretical point of view to refute this objection, when at the same time we declare that Peace is likely to need to be safeguarded by force; but the problem is no longer formulated in the way suggested by the objection. What there is now reason to ask is, whether any State is *likely* to take a step towards an outbreak of war, if it runs the risk of meeting an overwhelming coalition of Powers. Will it then not be inspired with the perception that war no longer is the *best* way of settling the conflict that has arisen? Is it not most likely that the State in question will choose more expedient means? Placed before the

constellation of Powers, it will understand that war no longer is a *practical ultima ratio* simply because better and less hazardous methods are available.

In the long run, however, everything depends on the question whether the Police Authority is effective enough. Suppose that not all the Powers join it? Shall we not in that case merely get a repetition of the system of alliances and *ententes* for the maintenance of the „balance" with competitions in armament as before? We cannot get away from this objection. Unless most of the Great Powers from both the Groups now fighting enter into the confederation unless the peoples are willing, after all the calamities they have suffered, to prevail upon their governments to cease this terrible policy, which has sacrificed the nations on the altars of war, there can be no question of the establishment of a world-police. Such a body can perform its task, only when it really can be considered as representing the society of nations. It may be taken for granted that the *Smaller Powers* will not risk entering into the Peace coalition, unless they are assured in advance that it will possess sufficient strength.

LIMITATION OF ARMAMENTS, BUT NOT DISARMAMENT.

It is evident, however, that it must be of extraordinary importance for the individual peace-willing State and its citizens if we could succeed in achieving a union of small and great powers for securing the peace of the world, and if this coalition gains the requisite strength and inner stability. Such an organization must in fact

give to each individual state a substantial increase of security. It would no longer stand alone against possible dangers from different quarters, but could count on assistance from States which could jointly possess the power to restrain any disturber of the Peace.

Hereby it would become possible for the individual State, owing to the increased safety gained, to reduce its military burdens. The cooperation of the States presupposes, of course, that each of them to the extent of its means shall contribute to the common military Police on which all have agreed. But on the other hand there can be no question of keeping up the whole military force, which the individual State, at present isolated, exerts itself to the utmost to maintain without certainty of support from others. An essential step towards the limitation of armaments would thus be the immediate consequence of the organization of the Peace coalition. This will certainly also be the *only* way to get a simultaneous international diminution of armaments. Examinations of the question have given the result, that the States are not willing to conclude any convention about simultaneous diminution of armaments unless at the same time an agreement is made that the States concerned shall form an alliance against aggressors, and in that way are compensated regarding the diminution of the safety involved in the reduction of military power.

Citizens of widely different opinions could surely not fail to greet the new arrangement with satisfaction. Those who find the only protection for a country in military defence, ought to have no objections to dimi-

nishing of the burdens of defence, provided that a solid combination of States, in which their own country has coinfluence, takes over part of the burden which has grown too heavy for the country. And those who, in the interest of Peace, have gone so far as to wish their own country to disarm, irrespectively of what their neighbours are doing, must say to themselves that, inasmuch as the sustaining military forces that are established can be used for nothing else except the realizing of the very idea to which the Peace movement devotes all its efforts, then the objection in principle to the military system of the State falls to the ground. They ought to understand that even from their own point of view the problem of disarmament has come into a quite new position. It is no longer the question of *militarism* ; it is the question of safeguarding the *Police* Authority that the world absolutely needs, in order to secure peace for humanity. The social-democracy of France in December 1915 pronounced for „an organization of economical and military means of power for the purpose of guaranteeing peace against states which violate justice."

The fight against militarism which must be pursued to the end, is fought in the most effective manner when the States themselves combine for the purpose. Those only who for reasons which are ultimately based on *religious* convictions, refuse to bear arms, even if the life of States and individuals alike is thereby hazarded, might be imagined as likely to oppose their country's joining other States in order to secure the peace of the world. But it is not likely that, for the sake of these

sections of society, the majority of the citizens would wish to abandon the maintenance of order in the society of nations, should it be if no other course is open, even by the sword of law.

THE ENFORCEMENT OF PEACE

BY

THE HON. WILLIAM H. TAFT *), U. S. A.

Our program is limited to the establishment of a League to enforce World Peace after the present World War shall close. We are deeply interested in bringing this war to a close and we would rejoice much in successful mediation, but our plan in order to be useful, we limit to the steps to be taken when peace comes to an international arrangement between the powers after war ceases.

The League was organized on Bunker Hill Day, a year ago, in Independence Hall, at Philadelphia. Its program contemplates a treaty between the great powers of the world, by which the signatories agree to be bound to four obligations;

The first is that all questions arising between the members of the league shall be submitted to a judicial tribunal for hearing and judgment.

Second, That all questions which cannot be settled on principles of law and equity shall be submitted

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*) By special consent of Mr. Taft, President of the "League to Enforce Peace", we are able to publish amongst our reports this study on the aims of the League to Enforce Peace, as explained by Mr. Taft in an address before the National Education Association, New-York the 3rd of July 1916.

to a Council of Conciliation for hearing, and a recommendation of compromise.

Third, That if any member of the league commits acts of hostility against another member, before the question between them shall be submitted as provided in the first two articles, the remainder of the members of the league shall jointly use forthwith their economic and military forces against the member prematurely resorting to war and in favor of the member prematurely attacked.

Fourth, That congresses between the members of the league shall be held from time to time to formulate and codify rules of international law to govern the relations between the members of the league unless some member of the league shall signify its dissent within a stated period.

1. Considering the fourth clause first, the question arises, What is International Law? It is the body of rules governing the conduct of the nations of the world toward one another, acquiesced in by all nations. It lacks scope and definiteness. It is found in writings of international jurists, in treaties, in the results of arbitration, and in the decisions of those municipal courts which apply international law, like the Supreme Court of the United States and courts that sit in prize cases to determine the rules of international law governing the capture of vessels in naval warfare. If is obvious that a Congress of the League with quasi-legislative powers could greatly add to the efficacy of international law by enlarging its application and codifying its rules. It would be greatly

in the interest of the world and of world peace to give to such a code of rules the express sanction of the family of Nations.

2. Coming now to the first proposal involving the submission of all questions at issue of a legal nature to a permanent internalional court, it is sufficient to point out that the proposal is practical and is justified by precedent. The Supreme Court of the United States, exercising the jurisdiction conferred on it by the Constitution, sits as a permanent international tribunal to decide issues between the States of the Union. The law governing the settlement of most of the controversies between the states cannot be determined by reference to the Constitution, to statutes of Congress, or to the legislation of the States. Should Congress in such cases attempt to enact laws, they would be invalid. The only law which applies is that which applies between independent governments, to-wit, international law. Take the case of Kansas against Colorado, heard and decided by the Supreme Court. Kansas complained that Colorado was using more of the water of the Arkansas River which flowed through Colorado into Kansas than was equitable for purposes of irrigation. The case was heard by the Supreme Court and decided, not by a law of Congress, not by the law of Kansas, not by the law of Colorado, for the law of neither applied. It was decided by principles of International Law.

Many other instances of similar decisions by the Supreme Court could be cited. But it is said that such a precedent lacks force here because the States are restrained from going to war with each other by

the power of the National government. Admitting that this qualifies the precedent to some extent, we need go no further than Canada to find a complete analogy and a full precedent. There is now sitting to decide questions of boundary waters (exactly such questions as were considered in Kansas and Colorado) a permanent court, consisting of three Americans and three Canadians to settle the principles of international law that apply to the use of rivers constituting a boundary between the two countries and of rivers crossing the boundary. The fact is, that we have gotten so into the habit of arbitration with Canada, that no reasonable person expects that any issue arising between us and that country, after a hundred years of peace, will be settled other than by arbitration. If this be the case beween ourselves and Canada, and England, why may it not be practical with every well established and ordered government of the Great Powers? The Second Hague Conference attended by all Nations recommended the establishment of a permanent International Court to decide questions of a legal nature arising between nations.

3. The second proposal involves the submission to a Commission of Conciliation of all questions that cannot be settled in court on principles of law or equity. There are such questions which may lead to war, and frequently do, and there are no legal rules for decision. We have such questions giving rise to friction in our domestic life. If a lady who owns a lawn permits childern of one neighbor to play upon that lawn and refuses to permit the children of another

neighbor, because she thinks the latter children are badly trained and will injure her lawn or her flowers, it requires no imagination to understand that there may arise a neighborhood issue that will lead to friction between the families. The issue is however, a non-justiciable one. Courts cannot settle it for the reason that the lady owning the lawn has the right to say who shall come on it and who shall be excluded from it. No justiciable issue can arise, unless one's imagination goes to the point of supposing that the husbands of the two differing ladies came together and clashed, and then the issue in court will not be as to the comparative training of the children of the families.

We have an analogous question in our foreign relations with reference to the admission of the Chinese and Japanese. We discriminate against them in our naturalization and imigration laws and extend the benefit of those laws only to whites and persons of African descent. This discrimination has caused much ill-feeling among the Japanese and Chinese. We are within our international right in excluding them, but it is easy to understand how resentment because of such discrimination might be fanned into a flame, if through lawless violence or unjust state legislation, the Japanese might be mistreated within the United States.

We have had instances of the successful result of Commissions of Conciliation where the law could not cover the differences between the two nations. Such was the case of the Behring Sea controversy. We sought to prevent the killing of female seals in the

Behring Sea and asserted our territorial jurisdiction over that sea for this purpose. The question was submitted to international arbitrators and the decision was against us, but the arbitrators, in order to save to the world the only valuable and extensive herd of fur seals, recommended a compromise by treaty between the nations concerned, and accordingly treaties have been made between the United States, Great Britain, Russia and Japan which have restored herd to its former size and value. So much therefore, for the practical character of the first two proposals.

The third proposal is more novel than the others and gives to the whole plan a more constructive character. It looks to the use of economic means first, and military force if necessary, to enfore the obligation of every member of the league to submit any complaint it has to make against another member of the league, to either the permanent international court, or to the Commission of Conciliation and to await final action by that tribunal before beginning hostilities. It will be observed it is not the purpose of this program to use the economic boycott or the jointly acting armies of the league to enforce the judgment declared, or the compromise recommended. These means are used only to prevent the beginning of war before there has been a complete submission, hearing of evidence, argument, and decision or recommendation. We sincerely believe that in most cases, with such a delay and such a winnowing-out of the issues and such an opportunity for the peoples of the different countries to understand the position of each

other, war would generally not be resorted to. Our ambition is not to propose a plan, the perfect working out of which will absolutely prevent war, first, because we do not think such a plan could perfectly work, and second, because we are willing to concede that there may be Governmental and International injustice which cannot be practically remedied except by force. If, therefore, after a full discussion and decision by impartial judges or a recommendation by earnest, sincere, and equitable compromisers, a people still thinks that it must vindicate its rights by war, we do not attempt in this plan to prevent it by force.

Having thus explained what the plan is, let us consider the objections wich have been made to it.

The first objection is that in a dispute between two members of the League, it would be practically difficult to determine which one was the aggressor and which one, therefore, in fact began actual hostilities. There may be some trouble in this, I can see, but what we are dealing with is a working hypothesis, a very general plan. The details are not worked out. One can suggest that an International Council engaged in an attempt to mediate the the differences might easily determine for the League which nation was at fault in beginning hostilities. It would doubtless be necessary where some issues arise to require a maintenance of the *status quo* until the issues were submitted and decided in one tribunal or the other; but it does not seem to me that these suggested difficulties are insuperable or may not be completely governed by a detailed procedure that of course must be fixed

before the plan of the League shall become operative.

The second objection is to the use of the economic boycott and the army and the navy to enforce the obligations entered into by the members of the League by the recalcitrant member. I respect the views of pacifists and those who advocate the doctrine on non-resistance as the only Christian doctrine. Such is the view of that Society of Friends which with a courage higher than those who advocate forcible means, are willing to subject themselves to the injustice of the wicked in order to carry out their ideal of what Christian action should be. They have been so far in advance of the general opinions of the world in their history of 300 years and have lived to see so many of their doctrines recognized by the world as just that I always differ with them with reluctance. Still it seems to me that in the necessity of preserving our civilization and saving our country's freedom and individual liberty maintained now for 125 years, we have no right to assume that we have passed beyond the period in history when Nations are affected by the same frailties and the same temptations, to cupidity, cruelty and injustice as men. In our domestic communities we need a police force to protect the innocent and the just against the criminal and the unjust and to maintain the guaranty of life, liberty and property. The analogy between the domestic community and that of nations is sufficiently close to justify and require what is in fact an International police force. The attitude of those who oppose using force or a threat of force to compel nations to keep

the peace is really like that of the modern school of theoretical anarchists, who maintain that if all restraint were removed and there were no government, and the children and youth, and men and women were trained to self -responsibility, every member of society would know what his or her duty was and would perform it. They assert that it is the existence of restraint that leads to the violation of right. I may be permitted to remark that with modern fads of education we have gone far in the direction of applying this principle of modern anarchy in the discipline and education of our childern and youth, but I do not think the result can be said to justify the theory if we can judge from the strikes of school children or from the general lack of discipline and respect for authority that the rising generation manifests. The time has not come when we can afford to give up the threat of the police and the use of force to back up and sustain the obligation of moral duty.

The third objection is that it would be unconstitutional for the United States through its treaty-making power to enter into such a League. The objection is based on the fact that the constitution vests in Congress the power to declare war. It is said that this League would transfer the power to declare war away from Congress to some foreign council, in which the United States would only have a representative. This objection grows out of a mis-conception of the effect of a treaty and a confusion of ideas. The United States makes its contract with other nations under the Constitution through the President and two-thirds

of the Senate who constitute the treaty-making power. The President and the Senate have a right to bind the United States to any contract with any other nation covering the subject matter within the normal field of treaties. For this purpose the President and the Senate are the United States. When the contract comes to be performed, the United States is to perform it through that department of the government which by the Constitution should perform it, and should represent the Government and should act for it. Thus, the treaty-making power may bind the United States to pay to another country under certain conditions a million dollars. When the conditions are fulfilled, then it becomes the duty of the United States to pay the million dollars. Under the Constitution only Congress can appropriate the million dollars from the treasury. Therefore, it becomes the duty of Congress to make that appropriation. It may refuse to make it. If it does so, it dishonors the written obligation of the United States. It has the power either to perform the obligation or to refuse to perform it. That fact, however, does not make the action of the treaty power in binding the United States to pay the money unconstitutional. So the treaty making power may bind the United States under certain conditions, to make war. When the conditions arise requiring the making of war, then it becomes the duty of Congress honorably to perform the obligation of the United States. The Congress may violate this duty and exercise its power to refuse to declare war. It thus dishonors a binding obligation of the United States.

But the obligation was entered into in the constitutional way and it is to be performed in the constitutional way. We are not lacking in precedent. In order to secure the grant of the Canal Zone and the right to finish the Canal, the treaty making power of the United States agreed to guarantee the integrity of Panama. The effect of this obligation is that if any other nation attempts to subvert the government of the Republic of Panama or to take any of her territory, the United States must make war against the nation thus invading Panama. Now Congress may refuse to make war against such a nation, but if it does so, it violates the honor of the United States in breaking its promise. The United States cannot make such a war unless its Congress declares war. That does not make the guarantee of the integrity of Panama entered into by the treaty making power of the United States unconstitutional. So here, when conditions arise under this League to Enforce Peace which would require the United States to lend its economic means and military force to resist the hostile action of one member of the League against another, it would become the duty of Congress to declare war. If Congress did not discharge that duty, as it has the power not to do under the Constitution, it merely makes the United States guilty of violating its plighted faith.

Again, it is said that to enter into such a League would require us to maintain a standing army. I do not think this follows at all. If we become, as we should become, reasonably prepared to resist unjust military agression, and have a navy sufficiently

large, and coast defenses sufficiently well equipped to constitute a first line of defence, and an army which we could mobilize into a half million trained men within two months, we would have all the force needed to do our part of the police work in resisting the unlawful aggression of any one member of the League against another.

Fourth, it has been urged that for us to become a party to this League is to give up our Monroe Doctrine, under which we ought forcibly to resist any attempt on the part of European or Asiatic powers to subvert an independent government in the Western Hemisphere, or to take from such a government any substantial part of its territory. It is a sufficient answer to this objection to say that a question under the Monroe Doctrine would come under that class of issues which must be submitted to a Council of Conciliation. Pending this, of course, the status quo must be maintained. An argument and recommendation of compromise would follow. If we did not agree to the compromise and proceeded forcibly to resist violation of the Doctrine, we should not be violating the terms of the League by hostilities thereafter. More than this, as Professor Wilson of Harvard, the well known authority upon International law, has pointed out, we are already under a written obligation to delay a year before beginning hostilities in respect to any question arising between us and most of the great powers, and this necessarily included a violation of the Monroe Doctrine. It is difficult to see, therefore, how the obligation of such a League as this would put us in any diffe-

rent position from that which we now occupy in regard to the Monroe Doctrine.

Finally, I come to the most formidable objection, which is that the entering into such a League by the United States would be a departure from the policy that it has consistently pursued since the days of Washington, in accordance with the advice of his farewell address that we enter into no entangling alliances with European countries. Those of us who support the proposals of the League believe that were Washington living to-day, he would not consider the League as an entangling alliance. He had in mind such a treaty as that the United States made with France, by which we were subjected to great embarrassment when France attempted to use our ports as bases of operation against England when we were at peace with England. He certainly did not have in mind a union of all the great powers of the world to enforce peace, and while he did dwell, and properly dwelt, on the very great advantage that the United States had in her isolation from European disputes, it was an isolation which does not now exist. In his day we were only three and a half millions of people with thirteen States strung along the Atlantic seaboard. We were five times as far from Europe as we are now in speed of transportation, and we were twenty-five times as far in speed of communication. We are now one hundred millions of people between the two Oceans and between the Canada Line and the Gulf. We face the Pacific with California, Oregon and Washington, which alone make us a Pacific power. We own Alaska, the north-western corner of

our Continent, a dominion of immense extent with natural resources as yet hardly calculable and with a country capable of supporting a considerable body of population. It makes us a close neighbor of Russia across the Behring Straits, it brings us close to Japan with the islands of the Behring Sea. We own Hawaii, 2.000 miles out to sea from San Francisco, with a population including 75.000 Japanese laborers, the largest element of that population. We own the Philippine Islands, 140.000 square miles with eight millions of people under the eaves of Asia. We are properly anxious to maintain an open door to China and to share equally in the enormous trade which that country with her 400 teeming millions is bound to furnish when organized capital and her wonderful laboring populations shall be intelligently directed towards the development of her naturally rich resources. Our discrimination against the Japanese and the Chinese presents a possible cause of friction in that resentment that they now feel which may lead to untoward emergencies. We own the Panama Canal in a country which was recently a part of a South American confederation. We have invested 400 millions in that great world enterprise to unite our Eastern and Western seaboards by cheap transportation, to increase the effectiveness of our Navy and to make a path for the world's commerce between the two great Oceans .

We own Porto Rico with a million people, 1500 miles out at sea from Florida and we owe to those people protection at home and abroad, as they owe allegiance to us.

We have guaranteed the integrity of Cuba and have reserved the right to enter and maintain the guaranty of life, liberty and property and to repress insurrection in that island. Since originally turning over the island to its people, we have had once to return there and restore peace and order. We have on our southern border the International nuisance of Mexico and nobody can foresee the complications that will arise out of the anarchy there prevailing. We have the Monroe Doctrine still to maintain. Our relations to Europe have been shown to be very near by our experience in pursuing lawfully our natural rights in our trade upon the Atlantic Ocean with European countries. Both belligerents have violated our rights and in the now nearly two years which have elapsed since the war began, we have been close to war in the defence of those rights. Contrast our present world relations with those which we had in Washington's time. It would seem clear that the conditions have so changed as to justify a seeming departure from advice directed to such a different state of things. One may reasonably question whether the United States by uniting with the other great powers to prevent the recurrence of a future world war may not risk less in assuming the obligations of a member of the League than by refusing to become such a member in view of her world-wide interests. But even if the risk of war to the United States would be greater by entering the League than by staying out of it, does not the United States have a duty as a member of the family of nations to do its part and run its necessary risk to make less probable the coming of such another

war and such another disaster to the humble race?

We are the richest nation in the world and in the sense of what we could do were we to make reasonable preparation, we are the most powerful nation in the world. We have been showered with good fortune. Our people have enjoyed a happiness known to no other people. Does not this impose upon us a sacred duty to join the other nations of the world in a fraternal spirit and with a willingness to make sacrifice if we can promote the general welfare of men.

At the close of this war the governments and the people of the belligerent countries, under the enormous burdens and suffering from the great losses of the war, will be in a condition of mind to accept and promote such a plan for the enforcement of future peace. President Wilson at the head of this administration and the initiator of our foreign policies under the Constitution, Senator Lodge, the senior Republican member of the Committee on Foreign Relations, and therefore the leader of the opposition on such an issue, have both approved of the principles of the League to enforce Peace. Sir Edward Grey and Lord Bryce have indicated their sympathy and support of the same principles and we understand that M. Briand of France has similar views. We have found the greatest encouragement in our project on every hand among the people.

VII. LIMITATION DES ARMEMENTS

LA PAIX ET LE DÉSARMEMENT.

PAR

DR. W. H. DE BEAUFORT, HOLLANDE.

Dans tous les pays, tant belligérants que neutres, les aspirations vers la paix s'accompagnent des vœux qu'on fait pour le désarmement. Qui s'étonnera de ce double désir? N'est-il pas dans la nature des choses que la durée de la paix, dans un avenir prochain, ne pourra être assurée que par la réduction des forces effectives de terre et de mer? A cette considération générale s'en ajoute encore une autre; si, après la fin de cette guerre, aucune convention, sous une forme ou une autre, ne vient limiter et rédire les armements, les préparatifs de guerre reprendront de plus belle sur l'ancien pied, c. à d. avec une progression ascendante des frais. Ce serait la course à l'abîme; tous les pays s'acheminent vers un avenir plein de soucis, où ils devront se battre les flancs pour réparer le délabrement de leurs finances, effet naturel des dépenses occasionnées par la guerre. Pour remédier à cette déplorable situation, beaucoup d'argent devra affluer au Trésor; mais il s'ensuit que d'un autre côté celui-ci ne devra pas perdre plus que le strict nécessaire pour faire face aux nécessités du moment et aux dépenses d'une évidente utilité pour l'avenir. Avant tout il faudra donc s'efforcer de réduire l'accroissement effroyable des budgets de la guerre et de la marine.

Si l'on réussit à obtenir des garanties suffisantes pour que la conservation de la paix semble assurée, et que les gouvernements et les parlements de tous les grands pays osent prendre l'initiative d'un désarmement partiel, la question se posera de savoir jusqu'à quel point on pourra l'effectuer sans modifier les législations nationales. Une pareille modification n'est certes pas impossible; ce qui au contraire semblera inadmissible ou du moins hautement improbable, c'est qu'on veuille modifier le régime du service obligatoire en vigueur dans presque tous les pays d'Europe, pour revenir à l'ancien système de recrutement des armeés au moyen de volontaires; et l'on ne peut guère se figurer que les exercices militaires s'accomplissent sans rassembler les hommes en troupes régulières loin de leurs domiciles respectifs. La première de ces éventualités s'accorderait mal avec les idées démocratiques, prédominantes dans tous les pays civilisés de l'Europe, la seconde serait en opposition avec tout ce que l'expérience militaire nous a appris depuis un demi-siècle.

Les difficultés qui surgiront, si l'on arrive à vaincre l'opposition existant dans les milieux militaires et gouvernementaux contre le désarmement, sont bien dignes de considération. Celui qui veut s'en faire une idée fera bien de jeter un coup d'œil sur le changement notable que les conceptions sur l'organisation de la défense nationale ont subi pendant les cent dernières années. Après que la grande armée de Napoléon eut livré à Waterloo son dernier combat, l'esprit belliqueux s'était éteint en Europe; les peuples n'avaient plus envie de se battre, et les gouver-

nements n'avaient plus d'argent. A quoi bon d'ailleurs, puisque à Vienne les frontières avaient été si soigneusement délimitées que personne ne pouvait plus être censé avoir sujet de se plaindre? Quoi qu'il en fût, l'expérience prouva que, si l'on ne songeait plus à la guerre, les grandes puissances ne pouvaient pas encore se passer d'armées. Ce qui, dans les Etats à régime constitutionnel, semblait inquiétant, c'était de voir employer ces armées hors des frontières pour tenir en échec ou réprimer la révolution. On crut devoir veiller contre le péril éventuel découlant d'une armée permanente en créant les milices bourgeoises, garde nationale ou civique. L'augmentation de la force militaire excitait les soupçons, et lorsque, vers le milieu du dix-neuvième siècle, Macaulay, dans l'introduction à son Histoire d'Angleterre, démontrait que le manque d'une armée permanente avait préservé sa patrie de la tyrannie des princes de la maison de Tudor, en signalant le fait que plus tard, après le rétablissement sur le trône de Charles II, les partisans des Stuarts avaient, sans le vouloir, par le licenciement de l'armée de Cromwell, enlevé à la monarchie l'arme par laquelle elle aurait pu établir et maintenir le pouvoir absolu, il avait touché une corde dont les vibrations trouvèrent un écho dans toute l'Europe libérale.

Le système du service obligatoire et personnel en vigueur dans la Prusse trouvait alors peu d'adhérents dans les Etats de l'Europe occidentale; on s'y accommodait du régime napoléonien de la conscription avec remplacement et tirage au sort, excepté en Angleterre,

où l'on avait gardé la vieille armée de volontaires. En Allemagne même et jusqu'en Prusse, les charges personnelles et pécuniaires du service militaire commençaient à provoquer le mécontentement, surtout lorsque, après le début ministériel de Bismarck, l'augmentation de l'armée prussienne fut arrêtée, contre la volonté expresse de la Chambre des Députés, avec le seul assentiment de la Chambre des Seigneurs. L'opinion s'émut; dans les villes et les villages on chanta:

"La récolte est manquée et la bourse vidée,
Mais toujours on prend plus de soldats pour l'ar-
[mée." [1])

Cependant on n'en vint pas à l'insurrection. Soudain un revirement se fit dans les esprits, par suite de la guerre de 1866, lorsque la Prusse, avec son armée parfaitement organisée, contraignit l'Autriche et les autres Etats allemands à une paix qui lui assura l'hégémonie en Allemagne et la mit au premier rang parmi les grandes puissances continentales de l'Europe. L'Allemagne parut gagnée au militarisme, et d'un seul coup, par l'épée de la Prusse, elle se voyait la route ouverte pour parvenir à l'unité si ardemment désirée par plusieurs. Dans la conscience de sa grande force, elle était dévorée du désir de jouer désormais le premier rôle dans la politique européenne, rôle qui lui avait été si longtemps refusé. Lorsqu'elle y parvint quatre ans plus tard, et que la France, après une série d'écrasantes défaites, eut été obligée de céder une partie de son territoire, il devint clair à tout observa-

[1]) „Die Beutel leer, die Ernte schlecht geraten, doch immer mehr und immer mehr und immer mehr Soldaten".

teur attentif que l'Allemagne ne pourrait conserver sa brillante position que par la crainte qu'une force militaire supérieure en nombre et en organisation inspirait au monde entier.

Après 1871 s'ouvrit pour l'Europe l'ère des armements, lorsque une à une toutes les grandes puissances, avec enthousiasme ou à contre-cœur, se mirent à rivaliser dans l'augmentation de leurs dépenses pour l'armée et la marine. C'est en vain qu'en 1898 le Tsar de Russie fit une tentative pour enrayer dans sa progression effrayante l'énorme acroissement de l'appareil militaire, au moyen d'un accord international. Elle échoua complètement: les considérations morales et les raisons pécuniaires furent également impuissantes à vaincre la méfiance réciproque des grandes puissances. A la deuxième Conférence de la Paix, le désarmement ne fut cité que pour mémoire. Ensuite les armements, surtout ceux par mer, prirent une extension que les générations précédentes auraient crue impossible. La génération présente, d'ailleurs, n'a pas non plus rêvé une guerre d'un coût aussi fantastique que celle que nous voyons.

Après la guerre de 1870—71, l'introduction du service obligatoire personnel et universel avait été préconisée dans tous les pays, comme une exigence impérieuse de la défense nationale. Quelques-uns craignaient de voir les intérêts de la société sacrifiés à ceux de l'armée: pour organiser l'armée, disait un orateur de la Seconde Chambre des Etats-Généraux des Pays-Bas, vous désorganisez la société. Il est curieux sans doute de constater que la question du service obliga-

toire personnel prit bientôt à tel point le caractère d'un problème social, que les objections furent sans peine écartées et que, dans les pays les plus pacifiques, elle fut résolue dans le sens d'une adoption pure et simple. La conviction de plus en plus répandue que le législateur ne doit attacher aucun privilège à la possession de la fortune a fait disparaître le remplacement du code militaire. Les adversaires des grandes armées et des exorbitantes dépenses qu'elles entraînent ont lieu de le regretter au point de vue de la politique générale, puisque le service personnel ouvre la porte par laquelle le service universel fait son entrée. Quand on abolit le remplacement, tout en conservant une force armée peu nombreuse, on crée dans la société, à côté d'un grand nombre de privilégiés exemptés de toute obligation militaire, un petit nombre de personnes désignées par le sort qui, dans, l'age où elles doivent songer à conquérir une situation sociale, sont sérieusement entravées dans ces efforts par les devoirs du service. Rien de plus contraire à l'idée égalitaire; et ceux qui veulent éliminer cette inégalité ne peuvent s'empêcher de se joindre à ceux qui demandent une extension de la force armée. C'est ainsi que là où le service obligatoire personnel a été introduit, la tendance au service universel, même en dehors des cercles militaires, devient de plus en plus marquée.

De cette genèse de l'accroissement des armées il sera facile de dégager la conclusion que le désarmement n'est pas chose facile, susceptible d'être réalisé par quelques articles de loi ou quelques résolutions. Il faut qu'il résulte, soit de l'abolition du service obligatoire

personnel, soit d'une diminution considérable des contingents annuels, soit d'un raccourcissement notable de la période d'instruction. Qu'on ne se laisse pas décourager dès l'abord par la considération des grands inconvénients que présente chacune de ces mesures, mais qu'on réfléchisse que le désarmements ne concernerait pas un seul pays, mais tous à la fois. Or, il est indéniable que, hors le cas où le désarmement serait imposé de force à un ou à plusieurs pays par une puissance supérieure victorieuse — ce qui serait regrettable, vu qu'il aurait un effet contraire à celui qu'on en devra attendre s'il arrive par un commun accord de toutes les puissances, — les inconvénients en question changent de caractère et perdent beaucoup de leur gravité.

En premier lieu, en cas de désarmement général, le service obligatoire personnel se présente sous un jour tout nouveau. L'objection incisive et irréfutable contre le remplacement, c. à d. qu'en temps de guerre il contraint les nécessiteux à risquer leur vie pour la patrie et fournit aux gens fortunés l'occasion de rester au coin du feu, tombe dès qu'une guerre entre deux Etats civilisés devient aussi exceptionelle qu'une guerre intestine. Car, si la conscience populaire désapprouve qu'on puisse se libérer à prix d'argent de ses devoirs militaires, ce n'est pas parce que la vie de soldat comporte des privations et même des dangers pour la vie et la santé qu'elle désire voir partagés à titre égal par tout le monde; la même chose s'applique à l'armée coloniale et, quoique à un moindre degré, à la police et au corps des pompiers, et pourtant nul ne

songe à introduire dans ces services le service obligatoire et personnel. Non, la considération qui a donné naissance à la conviction populaire que nous avons mentionnée, c'est que l'armée est appelée à remplir la tâche la plus importante, la plus noble et en même temps la plus périlleuse qu'on puisse imposer à un citoyen, à savoir la défense de l'indépendance de sa patrie contre une agression étrangère. Du moment que celle-ci n'est plus à redouter, et que l'armée n'est plus appelée à servir à la défense du pays, mais à maintenir le repos public, comme un auxiliaire de la police dans les circonstances extraordinaires, le mode de recrutement par la conscription et même, en cas de besoin, par le tirage au sort et le remplacement, n'apparaît plus aussi contraire à l'égalité des citoyens devant la loi. Au contraire, en égard à sa faible force numérique, ce mode sera même réputé conforme à la justice. En second lieu, dès que le désarmement général a été résolu, les exigences auxquelles devront satisfaire les armées et surtout celles des petits pays, seront bien moindres qu'à l'heure qu'il est. Si, par exemple, les armées des grandes puissances étaient réduites à l'effectif qu'elles possédaient au millieu du siècle dernier, les autres pourraient se contenter d'un effectif encore plus réduit. Mais non seulement les forces numériques, mais aussi les exigences relatives au degré d'instruction pourront être amoindries, car il est à prévoir que le désarmement procédera dans les grands pays, au début du moins, non par la diminution des levées, mais par la réduction de la période d'instruction. Si l'on tient compte de ces deux éventualités,

la perspective d'une modification des lois militaires existantes parait moins chimérique.

Si, par hasard, à la lecture de ces considérations sur un futur désarmement, quelqu'un hausse les épaules et, avec un sourire incrédule, parle de rêves, dont la réalisation ne sera vue d'aucun regard humain, je ne le tiendrai pas pour un militariste incorrigible. Celui qui a assisté aux événements de ces deux dernières années, où dans tous les pays, belligérants et neutres, le pouvoir militaire règne sans conteste, pourra difficilement se figurer que les forces innombrables que ce pouvoir tient ajourd'hui sous ses ordres se réduisent avant peu à un maigre troupeau. Celui qui, malgré toute la tristesse et l'horreur qu'il en puisse ressentir, est témoin de l'explosion des sentiments de haine entre les nations de l'Europe, sans exemple dans l'histoire moderne, sera probablement incapable d'admettre que cette haine puisse en peu de temps faire place à une confiance mutuelle et à une entente amicale, qui poussent les peuples à déposer tranquillement les armes.

Je comprends tout cela, mais je voudrais néanmoins demander à ces sceptiques: pouvez-vous facilement vous imaginer que cette guerre ne soit pas suivie d'un désarmement? Si l'on ne désarme pas, cela signifie, il ne faut pas se le dissimuler: continuation des armements actuels; mise à la réforme sans doute d'une partie de la force militaire sous les armes, mais en même temps application de tout ce que la guerre actuelle a enseigné en fait de massacre et de destruction, augmen-

tation de l'amas prodigieux de munitions, augmentation de l'armée, construction de fortifications cyclopéennes et de vaisseaux munis des plus formidables engins de destruction, fabrication d'une quantité infinie d'appareils d'aviation et d'aérostation de toute forme et de tout calibre, et bien d'autres choses encore. L'Europe si cruellement éprouvée et ruinée sera-t-elle même capable d'exécuter ce programme, et si les gouvernements osent s'y aventurer, les peuples le permettront-ils? Dans la plupart des grands pays d'Europe existe aujourd'hui le suffrage universel ou peu s'en faut, partant la possibilité pour les peuples de signifier leur volonté par la voie légale. Peut-on se figurer que des représentants, choisis par des hommes qui ont personnellement éprouvé les horreurs de la guerre moderne, autoriseront leurs gouvernements à paver la route qui mènera forcément à une guerre nouvelle, et cela dans un délai relativement court?

Les gouvernements eux-mêmes prendront, selon toute apparence, une attitude hésitante devant la question du désarmement; pour deviner dans quel sens elle s'orientera, il faudra savoir si c'est le ministre des finances ou celui de la guerre qui jouera le premier rôle. Par le désarmement, l'armée entre dans une condition qui, aux yeux des militaires naturellement, est jugée insuffisante et défectueuse; par conséquent ils s'opposeront toujours à ce que l'armée descende au-dessous du niveau qu'elle peut atteindre et qu'elle a déjà atteint. Le gouvernement et la nation passeront outre, avec d'autant moins de répugnance que le traité de paix comporte des garanties plus sérieuses pour les

rapports pacifiques à venir entre les Etats de notre partie du monde. Qu'il nous soit permis de le répéter encore une fois: rien ne serait plus apte à compromettre ces rapports qu'un désarmement imposé par la force. La paix de Tilsit en 1807 offre à cet égard un exemple instructif.

Supposons toutefois que l'éventualité d'une paix semblable soit écartée, et que, par un accord volontaire et pour se donner des garanties mutuelles, les Etats du vieux et du nouveau monde aient conclù sur le pied d'égalité un traité de désarmement, la question se pose: Quelle forme voudra-t-on donner à ce désarmement? Pour les forces matérielles, dont nous parlerons tout à l'heure, le problème est plus facile à résoudre que pour les forces vivantes. En effet, pour celles-ci des difficultés en apparence insurmontables se présentent, qui ne pourront être vaincues que par la ferme volonté de la majorité des gouvernants de parvenir au but désiré. La voie la plus directe serait sans doute de s'engager réciproquement à fixer pour chaque Etat le nombre des soldats qu'il pourra garder sous les armes, mais cette mesure ne paraît guère recommandable; la difficulté, pour ne pas dire l'impossibilité de s'assurer de tout temps si le chiffre fixé n'est pas dépassé doit à la longue susciter la méfiance. En outre, on pourrait, en exerçant hors de la caserne des hommes qui ne peuvent être censés appartenir à l'armée proprement dite, augmenter le nombre des combattants possibles, contrairement aux fins de la convention. Ce qui enfin pèse le plus lourd, c'est la grande probabilité que cette prescription nécessiterait dans plusieurs pays une modifica-

tion des lois; et le refus d'un seul parlement d'y prêter la main remettrait tout en question.

L'arrangement qui présenterait le moins d'inconvénients, et qui par conséquent se recommanderait le plus, consisterait peut-être à fixer pour chaque pays un certain montant — en proportion avec la superficie du territoire et le nombre des habitants — pour les dépenses affectées au personnel des forces de terre, soldes, traitements d'officier, pensions, etc., et à stipuler que ce montant ne serait pas excédé. Chaque gouvernement serait libre alors de faire de ces deniers l'usage qu'il voudrait .Sans doute le péril subsisterait que des sommes fussent portées au budget qui, destinées en apparence à d'autres usages, augmenteraient en réalité le montant convenu, mais il y a lieu de supposer que non seulement le contrôle réciproque des divers Etats, qui examineront les comptes publics l'un de l'autre avec des yeux d'Argus, découvrira bientôt la fraude, mais aussi que, dans les représentations nationales des différents pays, il y aura des membres, ardents défenseurs du désarmement, qui s'opposeront vigoureusement à tous les efforts pour l'éluder, aussitôt qu'ils s'apercevront que leur gouvernement risquera une tentative de ce genre.

Sans doute il faut regarder comme une grave limitation des pouvoirs de l'Etat d'empêcher le gouvernement de charger un article du budget au-delà d'un certain maximum, mais aujourd'hui déjà des restrictions d'une portée plus grande ont été fixées par des conventions et sont agréées par les gouvernements des plus grands pays. Un Etat se résigne généralement à

une pareille infraction à son autonomie, lorsque la mesure projetée n'a chance de réussir que si elle est adoptée par tous les intéressés, en vertu d'un traité international. Personne ne voudra nier que ceci s'applique au désarmement.

A l'égard des forces matérielles, les difficultés pour arriver à un accord sont bien moindres; avec un peu de bonne volonté il ne sera pas impossible de trouver ici des formules qui répondent au but et qu'il soit difficile d'éluder. En premier lieu il faudra tenir compte des vaisseaux de guerre, dont la construction met si fort aux abois les finances des Etats. Au moment de la conclusion de la paix, il ne sera pas difficile de dresser une liste des vaisseaux de tout calibre en possession des diverses puissances; ensuite on fixera le nombre de ceux des différentes classes qu'il sera loisible à chaque Etat d'entretenir.

Il ne faut pas se dissimuler qu'une pareille fixation rencontrera bien des obstacles; il faudra surtout beaucoup d'habilité pour mettre d'accord les deux principaux intéressés. Mais espérons que dans les cercles gouvernementaux anglais, il reste quelque chose de l'esprit de Gladstone, qui, lorsque dans sa chambre de malade avait pénétré le bruit des grandioses projets de flotte conçus à la suite des armements maritimes de l'Allemagne, s'écriait amèrement: "l'Angleterre est en train de devenir un asile d'aliénés"! Il condamnait ainsi dans les termes les plus forts cette surenchère des armements qui conduirait fatalement à la ruine; et nous sommes convaincus que, si le peuple allemand, content de sa puissante position sur le continent, veut

bien renoncer à être aussi le premier sur mer, il ne sera pas impossible d'arriver à une transaction.

S'il est possible d'arriver aussi à un accord au sujet des ouvrages fortifiés, tous les gouvernements qui ont pris des engagements devront être intitulés a contrôler l'observation de ces engagements chez les autres. Ces engagements tendront le plus souvent à ne pas faire quelque chose: construire des fortifications nouvelles; quelquefois à faire quelque chose: démolir les anciennes. Un même droit de contrôle devra être donné — et c'est là un des desiderata les plus importants — lorsqu' on prendra des résolutions à l'égard des armements. L'achat de nouveaux canons ou fusils, et aussi — à moins qu'on ne veuille les éliminer tout à fait du matériel de guerre — de nouveaux avions, ne pourra avoir lieu sans avis préalable; des secrets pour la fabrication des armes ne seront pas admis; une surveillance internationale des fabriques d'armes et de munitions de tous les pays et une défense de faire fabriquer des engins de guerre en dehors de ces fabriques seront indispensables.

Sans un revirement complet de l'opinion en cette matière, il ne faut pas compter sur la réalisation de toutes ces demandes. On observera pourtant une grande différence entre les grands et les petits pays. Dans ces derniers, on trouvera beaucoup d'esprits disposés à adopter d'emblée tous ces arrangements, mais dans les grands pays, l'immense majorité des militaires en tout cas s'y opposeront de toutes leurs forces. Quand les nouvelles inventions en fait de science militaire ne seront plus réservées pour la défense nationale,

mais deviendront la propriété commune de tous les pays, beaucoup de ceux qui, dans les grands pays, se creusent la tête pour trouver la solution d'une foule de problèmes stratégiques, renonceront de guerre lasse à leurs recherches et expériences. Des généraux et leurs états-majors, auxquels il ne sera plus loisible d'organiser leur armée de façon qu'elle surpasse celles de leurs voisins, exécreront les restrictions qu'on leur impose comme une coercition insupportable. Là où la population elle-même est animée d'un esprit militaire, beaucoup de leurs compatriotes partageront cette opinion et s'opposeront énergiquement à toute convention de désarmement.

Il faut donc s'attendre à une résistance formidable. C'est toutefois un phénomène rassurant de voir que les adversaires commencent déjà à comprendre jusqu'à quel point la détresse occasionnée par cette guerre remplit les cœurs de sentiments défavorables à leurs idées. "Peu de gens, écrit un général autrichien [1]), semblent être convaincus que la guerre actuelle n'est pas un orage passager, auquel succéderont comme par le passé des jours sereins et calmes. A la conclusion de la paix on s'attend à la démobilisation, à une réduction de la force armée et des dépenses soi-disant improductives, en un mot, à un retour à l'ancien avachissement, cette acagnardise de la paix." Rien de plus détestable selon lui. Il a l'air de croire que cette guerre sera suivie d'une période où — même en pleine paix — l'autorité militaire aura la direction de toutes les af-

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[1]) Freiherr von Woinovich, général de l'infanterie. *Deutsche Revue*, sept. 1916.

faires publiques, surtout dans la politique étrangère.

Il est sans doute plus grave qu'un des hommes d'Etat les plus habiles de l'Allemagne, le prince de Bülow, se soit prononcé dans ce sens [1]); il proclame sa conviction que l'empire allemand, après la guerre, devra augmenter considérablement ses armements sur terre et sur mer. Pour l'étayer toutefois, il part d'une assertion que les belligérants trouveront peu-être évidente, mais que les neutres n'accepteront pas sans conteste. L'Allemagne, dit de Bülow, doit compter que l'exaspération qui règne aujourd'hui en France, en Angleterre et en Russie continuera après la paix. Je comprends qu'un homme d'Etat d'un pays belligérant pense ainsi, mais comme neutre je crois être autorisé à mettre en doute cette opinion; les haines attisées de part et d'autre, non sans moyens artificiels, ne survivront pas longtemps à la paix. Je ne saurais croire à la guerre économique, dont on a tant parlé et que tant de gens redoutent si fort, guerre qui — à ce qu'on dit — éclaterait après la conclusion de la paix; ce serait pour moi un grand sujet d'étonnement s'il se trouvait un seul peuple disposé en pleine paix à acheter des objets de première nécessité à des prix exorbitants, pour le seul plaisir de nuire à un autre peuple. L'histoire des

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[1]) La haine nationale allumée par la guerre et scellée du sang des braves durera après la guerre jusqu'à ce qu'une autre tendance nationale la remplace. L'Allemagne doit se dire aujourd'hui que l'animosité qui règne en France, en Angleterre et en Russie se prolongera pendant la paix. La protection que l'Allemagne trouvera à l'avenir contre les nouveaux désirs de revanche à l'ouest, à l'est et de l'autre côté du Détroit ne peut résider que dans sa propre puissance agrandie (de Bülow, *Deutsche Politik*).

temps modernes nous apprend que, une fois la guerre finie et les excitations à la haine passées, les sentiments hostiles se refroidissent rapidement.

Les Français et les Anglais après Waterloo, les Prussiens et les Autrichiens après Sadowa, les Russes et les Japonais après la guerre furieuse qu'ils se sont faite, ne sont pas restés ennemis irréconciliables, mais après un temps plus ou moins long, sont devenus amis et alliés. L'explication de ce phénomène n'est pas difficile à trouver. L'homme déteste son semblable parce que celui-ci possède des qualités qui l'irritent constamment ou qu'il a perpétré des actes dont le souvenir ne pâlit qu'après la mort de l'auteur. Les nations se haïssent en vertu de traditions historiques, qui toutefois ne sont pas assez fortes pour faire taire la voix de leur intérêt bien entendu; quelquefois ils le font aussi par suite d'actions commises par leurs gouvernements, qui, lorsqu'ils font place à d'autres animés d'un esprit conciliateur, emportent avec eux les motifs de l'irritation. Les peuples se haïssent encore, bien entendu, pendant le temps qu'ils sont en guerre entre eux, mais cette haine ne dure généralement pas plus que l'inimitié officielle.

Pourquoi la guerre présente aurait-elle un tout autre effet que les guerres précédentes, et amènerait-elle des dispositions hostiles au lieu d'une réconciliation? Il n'est guère possible de trouver pour cela de bonnes raisons. Evidemment, à la conclusion de la paix, toutes les parties n'obtiendront pas tout ce qu'elles avaient espéré, il est même très probable qu'aucune d'elles n'obtiendra tout ce qu'elle avait espéré. Aucun peuple (comme tout le fait prévoir aujourd'hui) ne pourra se

glorifier d'un triomphe complet, pas plus qu'il ne se trouvera des peuples frustrés de tout point. Les relations ne seront pas celles de vainqueurs à vaincus; on peut espérer, par conséquent, que le sentiment d'amère rancune qui médite constamment une revanche ne règnera après la guerre dans aucun pays. Si l'on réfléchit en outre que les suites de l'épuisement qui fait gémir tous les peuples de l'Europe ne se feront sentir dans toute leur étendue qu'une fois la paix conclue, et que, dans les pays actuellement en guerre, la mémoire des souffrances éprouvées restera gravée dans tous les cœurs, il n'y aura plus à mon avis de motifs, pour craindre que des sentiments belliqueux reprennent le dessus, ou qu'un gouvernement qui voudrait les cultiver, y réussît aisément. Bien au contraire, je suis tenté de croire que, si la lutte se terminait par la conviction que l'équilibre des forces exclut la possibilité d'une solution par les armes, le moment sera très favorable pour le désarmement, à tel point que l'histoire des cent dernières années n'en a pas vu de pareil.

Le seul facteur qui décidera si ce moment, en cas qu'il arrive, sera utilisé, c'est la volonté des gouvernements et des hommes d'Etat qui seront appelés à conduire les négociations pour la paix. La question ne sera pas autant de savoir s'ils seront disposés au désarmement que s'ils le croiront possible. Henri Heine a dit un jour: "le diable n'existe que tant qu'on y croit." Cette boutade cache un sens profond; elle contient une vérité importante. Celui qui considère le désarmement dans les circonstances actuelles comme le plus grand

bienfait pour l'humanité, mais déclare en même temps que c'est un idéal irréalisable, ne contribuera pas beaucoup à sa réussite. Celui-là seul qui croit fermement que les gouvernements finiront par s'y plier, travaillera de tout son zèle à le faire aboutir. Il se contentera pour le moment d'un petit progrès: des réformes aussi considérables ne se font pas d'un seul coup, elles doivent avancer à bâtons rompus. Même quand le principe est admis, la possibilité d'une déception est toujours là. Cependant, une seule résolution relative au désarmement adoptée par toutes les grandes puissances serait déjà un motif pour se réjouir. Il y aurait alors lieu d'espérer qu'une opinion inspirée par l'amour du prochain et par le bon sens pousserait sans cesse les gouvernements à persévérer dans cette voie.

En Angleterre, quelques journaux ont plus d'une fois affirmé que cette guerre ne doit pas finir avant que le militarisme prussien n'ait été écrasé. Mais si ce militarisme prussien devait faire place à un autre militarisme, sous quelque forme que ce soit, sa destruction serait de mince valeur. Ce n'est pas la destruction du militarisme prussien, mais celle de n'importe quel militarisme qui doit être le résultat de cette guerre, si toutefois il en résulte pour l'humanité un effet dont elle puisse bénéficier. Je n'entends pas ici par militarisme la possession de grandes armées ou de grandes flottes en elle-même, mais le principe qui est à la base de ces armements, le principe que les Etats dans leurs relations réciproques puissent se faire justice par la supériorité de leurs armes. Les gouvernements qui prétendent appliquer ce principe les porteront à leur maximum,

afin de pouvoir intimider leurs voisins et, par la crainte qu'ils inspirent ou par l'usage de leur force, extorquer tout ce qu'ils veulent. Bref, c'est le règne de la maxime: la force prime le droit.

Si l'on veut, par un désarmement général, mettre fin à ce régime, il faut que le droit se substitue entièrement à la force. Mais alors ce droit devra être d'une si haute valeur que chacun le respecte et soit prêt à s'y soumettre. Aucun désarmement ne se peut concevoir sans un tribunal d'arbitrage international, satisfaisant aux plus hautes exigences, où siègent les jurisconsultes les plus compétents du monde entier et qui, pour l'intégrité et l'impartialité, soit au-dessus de tout soupçon. Les parties devront pouvoir influencer le choix des arbitres, ils ne devront pas être rebutés par les frais exorbitants, ils devront avoir la certitude que l'arrêt soit rendu dans un délai qui ne soit pas trop long, sans que par là la préparation et l'étude de l'affaire en litige soient compromises, en un mot elles devront avoir une confiance absolue dans leurs juges.

Heureusement nous possédons déjà une institution qui remplit presque entièrement toutes ces conditions. Ce n'est pas elle que le désarmement doive attendre. Aussi les négociateurs du prochain Congrès de la Paix n'auront-ils aucune difficulté à le décréter tout de suite. Quel cri de joie s'élèverait de l'Amérique et de l'Europe, s'ils avaient le courage de le faire!

DAS ABRUESTUNGSPROBLEM

VON

PROF. DR. R. BRODA, SCHWEIZ.

Die Abrüstung ist seit langen Jahren das populärste Schlagwort der Friedensbewegung. Dies ist leicht verständlich, weil ja in der Friedenszeit der latente Kriegszustand zwischen den Kulturvölkern im wesentlichen nur in der Tatsache der Rüstungen und in den enormen unproduktiven Ausgaben, die sie erforderten, in Erscheinung trat.

Die Rüstungen im wechselseitigen Einvernehmen zu beschränken, musste darum als "praktisches" Postulat gelten und in gleicher Weise für die grosse Masse, die unter dem Steuerdruck seufzte und für den "Realpolitiker" bestechend wirken. Andererseits sind ihr die wissenschaftlich durchgebildeten Kreise der pazifistischen Bewegung stets mit grosser Skepsis gegenübergestanden. Sie begriffen eben, dass die Rüstungen nicht eine *primäre* Erscheinung, sondern eine *Folge der zwischenstaatlichen Anarchie* — mit ihrem wechselseitigen Misstrauen, ihrer Unmöglichkeit, Völkerkonflikte mit anderen Mitteln als eben der militärischen Rüstungen zu entscheiden — darstelle. Auch die *technischen* Schwierigkeiten der Durchführung mussten dem in die Frage näher Eindringenden *sehr gross* erscheinen. Ehe wir uns aber in

diese Problemstellung vertiefen und das Mögliche vom Utopischen zu scheiden versuchen, erscheint es für eine wissenschaftliche Fundierung der Frage unumgänglich, die verschiedenen Umweltmöglichkeiten der Abrüstung zu umschreiben, die Fälle von Verwirklichung, resp-. von Verwirklichungsversuchen in der Vergangenheit kurz anzudeuten und so Klarheit über die Voraussetzungen, unter denen eine gemeinsame militärische Abrüstung in der Zukunft möglich wäre, zu gewinnen.

Der dem Geiste der Vergangenheit nächstliegende Fall der Abrüstung war auf die Besiegung eines Militärstaates und den Wunsch des Siegers, sich durch eine vertragliche Begrenzung der Rüstungen des Unterlegenen vor künftigen Rachekriegen zu sichern, begründet. Schon das Altertum kannte solche Fälle; in der Neuzeit ist die Heeresbeschränkung, die Napoleon Preussen nach der Niederlage bei Jena diktierte, am bekanntesten geworden. Bekannt ist auch, dass Preussen die Beschränkung seines stehenden Heeres durch Einführung der allgemeinen Dienstpflicht zu umgehen verstand und — den unkontrollierbaren Beschränkungen der Rüstungen zum Trotz — in einigen Jahren waffenmächtiger dastand als je. In gewissem Sinne ist dieser historische Präzedenzfall auch für unser technisches Problem der Jetztzeit lehrreich, weil er die *Schwierigkeiten der Kontrolle* beleuchtet; vor allem aber sehen wir, dass eine *erzwungene* Abrüstung Kräfte des Widerstandes und der List aufspeichert, die einen solchen Versuch von vorn herein zum Scheitern verdammen.

In der Gegenwart ist auch ernstlich nur mehr von *gleichzeitiger* Abrüstung möglicher Gegner (wie mehrmals in der Geschichte Süd-Amerikas) oder der ganzem Kulturwelt (Vorschläge des Zaren bei der ersten Haager Konferenz) die Rede gewesen [1]. Der Zahr schlug allerdings gleichzeitig die Aufrichtung einer internationalen Rechtsordnung, resp. zumindest eines obligatorischen Schiedsgerichtsverfahrens vor. Weil dieser Plan aber im Wesentlichen scheiterte, so hätte die Abrüstung inmitten eines anarchischen Völkerzustandes, der für die Entscheidung von Konflikten zunächst nur die End-Entscheidung durch die Waffen vorsah, erfolgen müssen. Dies war unmöglich und der Plan ist darum auch von den anderen Staaten kaum ernst genommen und nach kurzer Debatte, mit Fassung eines frommen Wunsches für die Zukunft, begraben worden. Diese Problemstellung gilt auch heute noch. Insolange von der Stärke der Rüstungen die Lebensinteressen der Völker abhängen, ist es naturgegeben, dass jedes Volk seine Rüstun-

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[1] Wehberg erwähnt in seiner Studie „Limitation des armements", (Brüssel, 1914, Misch & Thron) eine überraschende Fülle von Abrüstungsvorschlägen, die z. Th. von machtvollen Staatsmännern, so vom österreichischen Kanzler Kaunitz (gegenüber Preussen, kurz nach dem 7-järigen Kriege) und vom russischen Kaiser Alexander I bei Begründung der heiligen Allianz ausgingen. Alle diese Projekte blieben ergebnislos, ausgenommen einige amerikanische Versuche, so die Beschränkung der Kriegsschiffe auf den kanadischen Seen (im Einvernehmen zwischen den Vereinigten Staaten und Kanada, dies Abkommen wird bereits seit einem Jahrhundert beobachtet) und die Beschränkung der Kriegsflotten auf dem Schwarzen Meer (nach dem Pariser Frieden durch 14 Jahre lang eingehalten). Die scharfumgrenzte Gebietsausdehnung dieser Verträge erleichterte naturgemäss die Kontrolle.

gen soweit als möglich auszubauen sucht und jeden Versuch von aussen, es hierbei zu beschränken, mit grösstem Misstrauen betrachtet.

Freilich gibt es auch Präzedenzfälle, in denen *bei Fortdauer eines Kampfzustandes* doch *gewisse kostspielige Kampfmittel* durch wechselseitige Vereinbarung *ausgeschaltet* wurden; so stand, um einen lehrreichen wirtschaftlichen *Parallelfall* heranzuziehen, die Zuckerindustrie Deutschlands, Oesterreichs, Frankreichs, Russlands und Italiens um die Wende des Jahrhunderts in einem heftigen wechselseitigen Konkurrenzkampf, und jeder Staat suchte die Exportmöglichkeiten seiner Industrie dadurch zu verbessern, dass er für jeden Zentner Exportzuckers eine hohe Ausfuhrprämie gewährte und ausserdem den vollen Betrag der Zuckerkonsumsteuer rückerstattete. Amerika wieder als Importland wollte es nicht mitansehen, dass die Rohzuckergewinnung seiner Kolonien durch den Prämienzucker Europas verdrängt werde und erliess ein Gesetz, demzufolge die Exportprämien bei der Einfuhr als Zollgebür zu erheben seien. So kam es denn für einige Zeit, dass die für die Steuerzahler der europäischen Rübenzuckerländer drückenden Exportprämien einfach in die amerikanische Staatskasse flossen. Schliesslich drohte England, das gleichfalls die Rohzuckerproduktion seiner Kolonien schützen wollte, mit direktem Einfuhrverbot für Prämienzucker. So trat denn in Brüssel eine Konferenz aller Import- und Exportländer zusammen, die tatsächlich die einvernehmliche "*Abrüstung*" der Rübenzuckerländer beschloss, die Prä-

mien aufhob und den Zollschutz welcher der Produktion bessere Rüstung für den Export geben mochte, auf ein Höchstmass von 6 Franken pro Zentner beschränkte. Der Konkurrenzkampf der Exportländer dauerte an, *aber ihre Rüstungen blieben vertraglich beschränkt* und eine in Brüssel eingesetze Kontroll-Kommission sorgte getreulich und für lange Zeit für die Einhaltung dieser Rüstungsbeschränkung.

An sich ist es also, wie diese Erfahrung zeigt, nicht der Natur der Dinge nach unmöglich, dass bei Fortdauer eines Kampfzustandes die Rüstungsausgaben beschränkt werden. Aber im Falle der Zuckerindustrie lagen eben nicht derartige Lebensinteressen und Leidenschaften vor, wie beim militärischen Wettkampf der Völker, die Abrüstung war also wesentlich leichter, als sie im Falle unseres Problems sein würde.

Später ist eine Vereinbarung für gleichzeitige Begrenzung der englischen und deutschen Flottenrüstungen bis hart an die Verwirklichung herangediehen. Sie scheiterte im letzten Augenblick an der Unmöglichkeit, sich über eine Formel für die dauernde Neutralität Englands gegenüber den festländischen Gegensätzen zu einigen. Auch in diesem Falle lag jedoch eine relativ leichte Problemstellung vor, weil die Festhaltung einer bestimmten zahlenmässigen Kräftebeziehung zwischen den deutschen und englischen Grosskampfschiffen relativ offen zutage lag und weil bei der offenbaren Ueberlegenheit des englischen Schiffsbaus England die klar zutage liegende Möglichkeit besass, jedem Bau deutscher Schiffe den

Bau einer entsprechend grösseren Anzahl englischer Schiffe folgen zu lassen, die deutschen Geldaufwendungen also offenbar seine relative Stärke gegenüber dem Rivalen nicht verbessern konnten. Wenn es sich um den ganzen verwickelten Komplex von Land- und Seerüstungen aller Kulturvölker handeln würde, so könnte von einer solchen evidenten Unmöglichkeit, einen eigenen Stärkevorteil zu erlangen, nicht die Rede sein; tausend Möglichkeiten, einen Vorsprung durch technische Tüchtigkeit und List im einzelnen zu erlangen, liessen sich nicht beiseite schieben. Wenn also der Wunsch aller Staaten, den Nachbar zu überflügeln, mit gleicher Lebhaftigkeit wie bisher bestehen bleibt, so erscheint mir leider das Gelingen eines Planes für gleichzeitige Abrüstung der Kulturstaaten als rein utopisch und unmöglich.

Anders läge die Problemstellung erst, wenn es gelänge, *gleichzeitig* mit der Rüstungbeschränkung oder noch *vor* derselben *eine internationale Rechtsordnung aufzurichten*, die Entscheidung der Völkerkonflikte einem internationalen Gerichtshof zu überweisen, eine internationale Exekutivgewalt zwecks Durchsetzung der Gerichtsentscheidungen aufzurichten und derselben hinreichende militärische Machtmittel — sei es in Form einer Polizeitruppe, sei es Form einer Berechtigung, an die militärische Unterstützung aller Vertragsstaaten gegen jeden Friedensbrecher zu appellieren — zur Verfügung zu stellen. Dann würde der Besitz einer grossen Militärmacht nicht mehr den einzigen Schutz der Unabhängigkeit der

Staaten darstellen, dann würde er aufhören, ein Lebensinteresse für sie zu sein, dann würde der egoistische Wunsch nach Ersparnissen dem Verlangen nach Verstärkung der Rüstungen in weitgehendem Mass die Wage halten, dann könnte also auf Behebung des wechselseitigen Misstrauens und auf guten Willen der einzelnen Staaten für eine Herabsetzung der Rüstungen gerechnet werden, dann würde die *Kontrolle* der Rüstungsbeschränkung keinen unüberwindlichen Schwierigkeiten begegnen.

Eine solche Begrenzung der Rüstungen wäre dann aber auch im Interesse des Bestandes der internationalen Rechtsordnung notwendig, vor allem aus folgenden Gründen:

a) um den schwächern Staaten erhöhtes *Vertrauen* in den guten Willen der grösseren und in ihre eigene Rechtssicherheit zu geben;

b) weil die Rüstungen und die durch sie zu Macht und Einfluss emporgetragenen Militärkasten eine natürliche Entwickelungstendenz zur *praktischen Anwendung* der mit soviel angewandter Wissenschaft zusammengetragenen militärischen Machtmittel besitzen;

c) *Um Präventivkriege zu verhindern.*

Gerade die Geschichte der letzten Jahre zeigt an 2 Beispielen, wiesehr der Rüstungwettkampf zum tatsächlichen Ausbruch des Krieges beigetragen hat. Zunächst blickte England mit Misstrauen auf das Anwachsen der deutschen Flottenrüstungen, das seine Seeherrschaft bedrohte und die Sicherheit für einen

günstigen Ausgang eines Seekrieges von Jahr zu Jahr vermindern musste. Dies ist gewiss einer der Hauptgründe gewesen, um derentwillen England sich mit Russland und Frankreich zwecks Erhaltung des Gleichgewichts Deutschland gegenüber verband und diese Einkreisung wieder liess in Deutschland den Gedanken gross werden, *lieber in einem Augenblick loszuschlagen, wo es besser vorbereitet war als die Gegner, als auf die Vollendung ihrer Rüstungen, spez. den Ausbau der strategischen Bahnen Russlands zu warten.* Auch für den unmittelbaren Ausbruch des Krieges zwischen Deutschland und Russland war wieder ein rüstungstechnisches Detail in erster Linie verantwortlich, nämlich der Wunsch Deutschlands, *den Vorteil seiner raschern Mobilisierung auszunutzen* und Russland nicht durch Fortdauer der Unterhandlungen Zeit für Vollendung seiner Mobilisierung zu lassen.

d) weil nur die Herabsetzung der Rüstungen einen gewissen Ausgleich gegenüber der drückenden Verpflichtung für die Verzinsung der Kriegsanleihen gewähren und vermöge der so gemachten *Ersparnisse* die Fortführung von Kultur- und Sozialpolitik gestatten würde.

Aus diesen Gründen wird es unumgänglich notwendig sein, schon auf dem kommenden Friedenskongress die Frage der einvernehmlichen Rüstungbegrenzung in Erwägung zu ziehen. Grosse Stimmungsfaktoren werden zugunsten einer positiven Erledigung sprechen und gegenüber den sonst stets siegreichen Widerständen der an grossen Rüstungen inte-

ressierten Militärkreise und Rüstungsindustriellen vielleicht doch die Oberhand behalten. Es wird im wesentlichen nur darauf ankommen, technische Methoden zu finden, um die Rüstungsbegrenzung wirklich *gleichmässig* zu gestalten und *wirksam zu kontrollieren.*

Im folgenden soll versucht werden, in kritischer Untersuchung der Schwierigkeiten, welche sich einer einvernehmlichen Abrüstung im einzelnen entgegenstellen und in Berücksichtigung der Momente, an welche dieselbe doch anknüpfen könnte, einen Plan für das grosse Werk zu entwerfen u. zw. zunächst für die Landheere, dann für die Seeflotten und schliesslich für die Luftflotten.

I. LANDHEERE.

Der Rüstungaufwand der Völker für die Zwecke der Landkriegsführung besteht erstens in der Bereitstellung der entsprechenden *Anzahl von Soldaten* für den Kriegsdienst, 2. in der Herstellung von *Waffen und Kriegsmaterial* aller Art. Für die Unterhaltung dieser Soldaten und den Ankauf des Kriegsmaterials, sowie für eine Reihe anderer Unternehmungen — wie den Bau von strategischen Eisenbahnen und Festungen u. s. w. — hat das *Kriegsbudget* aufzukommen.

Eine Begrenzung der Rüstungen käme also in Frage: a. für den zahlenmässigen Bestand des Heeres, b. für den Umfang der Kriegsmittel, resp. es könnte kumulativ mit diesen beiden Begrenzungen oder aber statt ihrer das Kriegsbudget eingeschränkt werden.

Aufgabe der folgenden Untersuchung wird es sein, festzustellen, ob nicht vielleicht die Schwierigkeiten für wirksame Durchsetzung und Kontrolle dieser Begrenzungsmassnahmen bezüglich der 3 in Frage kommenden Kategorien recht sehr verschieden sind und ob sich nicht vielleicht der Endzweck durch eine bloss *teilweise* Erfassung derselben erreichen lässt.

Die militärische Verfassung sämmtlicher europäischen Grossmächte beruht auf der allgemeinen Dienstpflicht, die wieder die Verpflichtung zum Dienste im stehenden Heere und zu einer Reihe von Waffenübungen in der Reserve sowie die Dienstleistung im Kriegsfalle in sich begreift. Letztere kann hier ausser Berücksichtigung bleiben, weil wir uns ja bloss mit dem Problem der Rüstungen während der Friedenszeit zu beschäftigen haben. Den Umfang der Heere im Falle eines ausgebrochenen Krieges — sofern dieser Fall nicht durch die zwischenstaatliche Organisation *ausgeschlossen* wird — festlegen zu wollen, wäre ja offenbar *utopisch.*

Der Umfang des jährlichen Rekrutenkontingents, die Dauer der Dienstleistung im stehenden Heer und bei den Uebungen sind in allen europäischen Staaten (mit Ausnahme Englands, das die Dienstpflicht erst während des Krieges eingeführt hat) in genauen Gesetzen geregelt. Diese sind von den Parlamenten in öffentlicher Beratung gebilligt worden. Die bezüglichen Ziffern sind überall verlautbart, eine Möglichkeit der Geheimhaltung vor dem Ausland besteht nicht. Wenn also der Umfang der Heere und die Dauer des von jedem Soldaten zu leistenden Dienstes durch

internationale Vereinbarung begrenzt würde, so wäre eine geheime Durchbrechung dieser Festsetzungen durch die einzelstaatlichen Regierungen kaum tunlich. Sie müssten sonst auch ihre eigenen Parlamente, denen ja das Recht der Bewilligung des Rekrutenkontingents zusteht, täuschen, die eigene Presse, was in der Friedenszeit doch nicht so leicht möglich ist, unter Zensur stellen, die Informationsmöglichkeiten der fremden Militärattachés in einem Grade, der auch wieder mit den diplomatischen Gepflogenheiten schwer vereinbar wäre, beschränken.

Die Regierungen haben aber auch unter der Voraussetzung, dass ihnen die internationalen Exekutivgewalt wirklich Schutz gegen Angriffe zu verbürgen scheint, keinen sehr starken Anreiz, mehr Soldaten anzustellen, als ihnen vertraglich gestattet ist. Denn sie entziehen ja damit der heimischen Produktion wertvolle Kräfte und mindern deren Konkurrenzfähigkeit für den Wirtschaftskampf. Dies sei speziell erwähnt, weil es im Gegensatz zu der später zu erörternden Problemstellung bei der Herstellung vervollkommneter Kriegsmittel steht. Jeder Staat hat den instinktiven wie auch bewussten Wunsch, lieber modernere und vervollkommnetere Kriegsmittel, als veraltete zu gebrauchen, sein Geld lieber für die Herstellung der technisch vorzüglichsten als minderwertiger Ware auszugeben; jeder Staat müsste also ein Verbot der Modernisierung seiner Kriegswaffen oder — wie man im Sprachgebrauch der anderen Seite sagen könnte — der Herstellung immer furchtbarerer Mordwerkzeuge als einen peinvollen Eingriff in

seine Dispositionsfreiheit betrachten. Um technische Erfindungen praktisch anzuwenden, hierzu bedarf die Heeresleitung auch keiner parlamentarischen Bewilligung. Sie ist nicht gewohnt, sich in diese Angelegenheiten hineinreden zu lassen. Bei der Höhe des Rekrutenkontingents jedoch ist der Kriegsminister seit altersher gewohnt, mit parlamentarischen Widerständen zu rechnen und der neue internationale Vertrag gesellt sich also gewissermassen diesen alten "Hemmnissen" zu. Die Zahl der Soldaten, die die Nation ihm zur Verfügung stellen soll, ist etwas, das er *von aussen empfängt* und wenn sie ihm infolge eines internationalen Vertrages nur in begrenzterem Masse geboten werden kann, so ist er eher geneigt sich damit abzufinden, als mit einer Durchkreuzung der *inneren* Organisation seines Dienstes. Es erschiene mir darum durchaus möglich und wünschenswert, dass zunächst *die Erhöhung des Rekrutenkontingents und die Vermehrung der im stehenden Heere und bei den Uebungen abzuleistenden Diensttage einvernehmlich untersagt werde* und dann allmählich nach einem festzulegenden Schlüssel eine prozentuale Minderung beider Ziffern einzutreten habe.

Man hat von manchen Seiten auch vorgeschlagen, den Umfang der Armeen in Berücksichtigung von Einwohnerzahl oder Finanzkraft der Staaten festzulegen. Aber dies würde tausend Empfindlichkeiten stören und einer künstlichen Klassenänderung der einzelnen Staaten gleichkommen. Viel näher liegt es, einfach *den gegebenen Stand der Dinge als Ausgangspunkt zu nehmen*. Freilich nicht den Stand der Dinge

im Kriege, die Einbeziehung der ganzen gesunden männlichen Bevölkerung in die Armee. Wollte man eine *solche* Grenze aufstellen, so würde sie allerdings leicht eingehalten werden, da niemand den Wunsch haben würde, noch grössere Heere zu unterhalten, als während der Kriegszeit. Aber ein solcher Umfang der Armee würde selbstverständlich die wirkliche Leistungsfähigkeit der Völker dauernd lahmlegen. Man müsste also auf den Stand der Dinge *vor* Ausbruch des Weltkrieges zurückkommen und ihn als Maximum fixieren.

Eine Schwierigkeit ergäbe sich bloss für *England,* weil dieses eben seine ganze Kriegsorganisation während des Feldzuges umgewandelt hat. Man könnte ihm nicht zumuten, zur geringen Zahl der Divisionen seines alten Expeditionkorps zurückzukehren. Eine Fixierung auf Grund von Bevölkerungszahl und Finanzkraft würde ihm jedoch wieder derart grossen Spielraum geben, dass damit eine dauernde Verschiebung des Mächtegleichgewichts zu ungunsten seiner Gegner, also vor allem Deutschlands, verbunden wäre. Eher scheint es möglich, den Umfang seiner künftigen Landarmee *in gleicher Höhe wie den der französischen Streitmacht zu bemessen.*

Freilich hat England (auch ohne Irland) mehr Einwohner und wesentlich grössere finanzielle Mittel als Frankreich, andererseits ist der Prozentsatz des stehenden Heeres gegenüber der Gesamtbevölkerung in Frankreich vor dem Kriege grösser als in irgend einem andern Lande gewesen, sodass bei Zugrundelegung dieser Norm England immer noch einen sehr beträchtlichen Spielraum für seine Heeresmacht er-

hielte. Durch Heranziehung eines solchen Masstabes würde andererseits die heikle Notwendigkeit einer Abmessung der allgemeinen Kraft und Bedeutung des englischen Volkes durch fremde Richter vermieden werden können. Für die englischen Kolonien mit Milizsystem einerseits (also Kanada, Australien, Südafrika und Neuseeland) wie andererseits auch für die Schweiz und Amerika wäre freilich eine solche Festlegung schwierig. Soll und kann man sie verhindern, dem allgemeinen Zug der Zeit zu folgen und zum System der stehenden Heere überzugehen? Die Schweiz, vielleicht auch Amerika, würden wohl aus eigenen Stücken davon absehen. Aber in Australien und Kanada ist die Strömung sehr stark. Eventuell müsste in diesem Ausnahmefall doch eine Begrenzung nach deduktiven Gesichtspunkten gemacht werden, etwa derart, dass die englischen Kolonien ermächtigt würden, Armeen jenes Umfangs, der der Verhältniszahl ihrer Bevölkerung zu der Grossbritanniens selbst entspricht, zu unterhalten.

Um Umgehungen des Vertrages zu verhindern, müsste ferner auch *der Bestand an Kolonialtruppen und militärisch organisierter Gendarmerie dem Umfang der stehenden Heere hinzugezählt* und die so gewonnene Ziffer als Status quo zum Maximum für die Zukunft erhoben werden. Den Staaten bliebe es überlassen, ihre Kolonialtruppen oder ihre Gendarmerie zu erhöhen, im Falle sie gleichzeitig den Bestand ihres stehenden Heeres heruntersetzen.

Auch das *Offizierscorps* wäre einfach in der Gesammtziffer des stehenden Heeres mitzuzählen; wollte

man etwa spezielle Höchstsätze für die Zahl der Offiziere festlegen, so würde man dem Versuch, die Offiziere durch Personen des Mannschaftsstandes mit anderm Titel, aber ähnlichen Funktionen zu ersetzen, Tür und Tor öffnen. — Eventuell könnte man den Staaten eine noch grössere Freiheit in der äussern Organisation geben, indem man als Maximalziffer nicht separat den Umfang des stehenden Heeres und die Dauer der Dienstleistung bei den Uebungen fixieren, sondern die Anzahl der *Tage*, die alle Soldaten, gleichviel ob im stehenden Heere oder bei Uebungen im Laufe eines Jahres unter den Waffen verbringen würden. Es bliebe also den Staaten z. B., freigestellt, hunderttausend Mann 2 Jahre im stehenden Heere und 4 Monate bei Uebungen zu beschäftigen, oder aber statt dessen 400.000 Mann durch 7 Monate lang — im Sinne eines erweiterten Milizsystems — unter den Fahnen zu halten.

Das blosse Verbot, über den Heeresstand vom 1. August 1914 hinauszugehen, würde zunächst auch in militärischen Kreisen nicht allzu drückend empfunden werden. Ein "Brotloswerden" von Offizieren in grösserm Masstabe wäre nicht zu befürchten. Wenn für die Zukunft auch nur eine jährliche Einschränkung von 5 % verfügt würde, so vermöchte dies in absehbarer Zeit zu sehr wesentlichen Ersparnissen an Menschenkraft und Geldanwendung zu führen und würde doch keine erworbenen Rechte in allzu brüsker Weise durchkreuzen.

Viel schwieriger liegen die Dinge, wie oben angedeu-

tet, bei der Begrenzung der Waffen und Kriegsmittel. Es sei denn, man begnüge sich, wie später näher ausgeführt werden soll, mit der Festlegung der *Summen*, die für militärische Zwecke ausgegeben werden dürfen und begrenze damit *indirekt* den Gesammtumfang der Mittel, die für die Erweiterung und Modernisierung der Waffen zur Verfügung stehen.

Im einzelnen den technischen Fortschritt — äussere er sich auch in noch so unsozialer Richtung — unterbinden zu wollen, ist unmöglich.[1]) Keine Heeresverwaltung wird sich dazu bequemen, eine relativ langsam feuernde Schnellfeuerkanone zu benutzen, wenn ihr eine schneller feuernde angeboten wird, eine Vervollkommnung der Geschosse zurückzuweisen, weil das Ausland es ihr so befiehlt. Keine Heeresverwaltung kann aber auch ohne ernsten Schaden fremden Experten Einblick in ihre Fabrikationsgeheimnisse gewähren und ohne solchen Einblick ist eine Kontrolle unmöglich. Was dem Parlamente und seiner Berechtigung zur Festlegung von Rekrutenkontingent und Kriegsbudget stets verschlossen blieb, die Sphäre der internen kriegstechnischen Organisation, das muss und wird auch dem Zugriffe des Auslands verschlossen bleiben. Tausend Wege würden sich finden, um diese Gebote zu umgehen. Sehr scharfsinnig führt auch ein überzeugter Pazifist, Gustav Spiller (London), der Generalsekretär des internationalen Verbandes ethischer Gesellschaften, in der "Voix de l'Humanité" vom

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[1]) Im einzelnen wurden derartige *russische Anträge* auf der ersten Haager Konferenz discutiert (Verbot neuer Gewehrmodelle u.s.w.), jedoch mitt grosser Mehrheit *abgelehnt*.

16. August aus, dass es "äusserst schwierig wäre, die Entwicklungsmöglichkeiten der einzelnen Waffengattungen zu berechnen" und stützt diese Behauptung auf die Tatsache, dass kaum jemand vor dem Kriege eine klare Vorstellung von den Möglichkeiten der weittragenden Geschütze, der schweren Mörser, der Mitrailleusen, der Unterseeboote besessen habe. Es sei unmöglich, ein Inventar dieser Kriegsmittel anzufertigen und sie nach einem einheitlichen Plane zu umschreiben. Selbst wenn man etwa die Zahl der Mitrailleusen oder Flugzeuge dieses und jenes Typs begrenzen wollte, so könnte man doch nicht Neuerfindungen verhindern und diese würden die ganze Problemstellung verändern, bevor der Vertrag auch nur rechtsgiltig wäre. Eine solche Vereinbarung würde geradezu den Wettlauf um neue Kriegserfindungen anfeuern und jenes Moment im Bewaffnungsproblem, das jeder Regelung widerstrebt, verstärken. Man müsste denn geradezu neue Erfindungen verbieten oder die Generalstäbe zwingen, sie sich wechselseitig mitzuteilen. Das würde aber bedeuten, dass sie sich wechselseitig auf dem Laufenden über ihre Pläne halten müssten — und das ist absurd.

Nun könnte man ja einwenden, die Vervollkommnung der Kriegsmittel lasse sich nicht ausschliessen, aber wenigstens gewisse greifbare Tatsachen, wie etwa die *Zahl der Geschütze*, könnten begrenzt werden. Auch Herr de *Beaufort*, der frühere holländische Minister des Auswärtigen und Ehrenvorsitzender der 1. Haager Konferenz, schlägt in einer interessanten Broschüre vor, die Zahl der Geschütze u. s. w. vertrag-

lich festzulegen. Auch das ist schwierig. Denn eine Fixiering der *Zahl* würde notwendigerweise zum Versuche führen, die in diesem Rahmen gestatteten Geschütze *besonders leistungsfähig* zu gestalten, also zur Herstellung besonders grosser Kaliber und "technischer Meisterwerke" führen. Wollte man auch für die einzelnen Kategorien von Geschützen Maximalzahlen festsetzen, so liesse sich doch die technische Vervollkommnung der Details nicht ausschliessen und das Ganze würde zu einem unerträglichen Komplex ständiger Anfechtungen und steten Misstrauens führen.

Auch das *Verbot gewisser Kriegsmittel* hat sich in der Vergangenheit nicht bewährt. Das Verbot des Bomben-Werfens aus Flugzeugen wurde aufgehoben, die Beschränkungen für den Gebrauch von Geschossen, die giftige Gase verbreiten, sind in der Praxis nicht beachtet worden, der Gebrauch brennender Flüssigkeiten, giftiger Gaswolken usw. hat sich verallgemeinert. Der Krieg selbst ist eben seiner Natur nach ein der gesetzlichen Begrenzung und Humanisierung widerstrebendes Gewaltding; ein Kriegsrecht ist ein Widerspruch in sich selbst und die Erfahrungen dieses Krieges, die stets wiederkehrenden Vorwände "dass diese und jene unerlaubten Kriegsmassregeln sich als Repressalien rechtfertigen liessen", die Unmöglichkeit, diese Fragen der Zulässigkeit von Repressalien durch eine unparteiische, über entsprechende Machtmittel verfügende Instanz entscheiden zu lassen, all das sollte dazu führen, das Völkerrecht innerhalb seiner möglichen Grenzen, d. i. des Friedensrechtes, zu belassen und das "Kriegsrecht" als solches

aufzugeben, resp. allenfalls auf Gesichtspunkte der Schonung von Verwundeten, also auf rein humanitäre Massregeln, die die Interessen der Kriegführenden nicht wesentlich stören, zu beschränken.

Lassen sich aber Kriegsmittel nicht *für den Ernstfall verbieten*, so wird man es auf keine Art hindern können, dieselben insgeheim auch während der Friedenszeit *vorzubereiten* und der Abrüstungsgedanke in der Sphäre der Kriegsmittel und Bewaffnung wird sich eben nur indirekt durch Beschränkung der hierfür zur Verfügung stehenden *Geldmittel* verwirklichen lassen. Diese Mittel empfängt das Heer *von aussen*. Sie zu beschränken, braucht man nicht den unmöglichen Versuch eines Eingriffs in seine eigene Dispositionssphäre zu unternehmen, diese Mittel mussten auch bisher von den Parlamenten bewilligt werden und diese Bewilligung unterlag auch bisher öffentlicher Debatte und Kontrolle. Diese Mittel durch internationalen Vertrag zu beschränken und die Einhaltung dieser bestimmungen *wirksam zu kontrollieren*, ist also unschwierig.

Wieder könnte bei dieser Festlegung der materiellen Mittel, wie oben bei der Begrenzug der "menschlichen Mittel" ausgeführt wurde, *der Stand des Kriegsbudgets für das Landheer vom 1. August 1914 als Maximum fixiert* und eine jährliche Verminderung um 5 % in Aussicht genommen werden. Auch die von der Internationalen Zentralorganisation für Dauerfrieden eingesetzte holländische Kommission zum Studium der Abrüstungsfrage kommt im wesentlichen zu diesem Beschlussantrage, das durch die tatsächliche Ent-

wicklung erreichte Kriegsbudget der einzelnen Staaten als Maximalziffer zu fixieren und für die Zukunft eine graduelle Minderung in Aussicht zu nehmen. Für Grossbritannien könnte wieder das französische Heeresbudget als Maximum festgelegt werden; für die englischen Kolonien eine Ziffer, die dem Verhältnis ihrer Bevölkerung zu der Grossbritanniens entspräche.

Eine gewisse Schwierigkeit erwüchse aus der Gewohnheit mancher Staaten, Posten, die eigentlich ins Kriegsbudget gehören, in andere Rubriken des Gesammtbudgets einzuzeichnen, z. B. die Kosten für den Bau strategischer Eisenbahnen aus den Ueberschüssen der Staatsbahnen zu bestreiten. Krasse Fälle müssten durch die später zu erörternde Ueberwachungsstelle ausgeschaltet werden [1]. Was jedoch speziell die Bahnen anbelangt, könnte durch allgemeine Uebereinkunft der unbegrenzte Bau derselben, unabhängig vom Kriegsbudget, *freigegeben* werden. Indirekt kommen diesel-

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[1]) So die Belastung von Gemeindebudgets mit Ausgaben für die Rekrutierung. Oeffentliche Subscriptionen für militärische Zwecke (etwa für Spezialwaffen, wie seinerzeit für die Flugzeuge) wären in das zu begrenzende Kriegsbudget *einzurechnen*. — Dagegen könnte aus humanitären Gründen, wie dies der bayrische Landtagsabgeordnete Dr. L. Quidde in seinem „Projet d'un traité international pour la limitation des armements" im Jahre 1913 vorschlug, die Erhöhung von Pensionen und Bezügen gestattet werden, ohne dass diese Mehrausgaben auf das Kriegsbudget angerechnet würden. Die seitherigen Ereignisse geben seinem Vorschlag erhöhte Aktualität. Es wäre in der Tat unhuman, speziell die Leistungen an die Kriegsinvaliden irgendwie beschneiden zu wollen. Andrerseits müsste, gerade aus humanitären Gründen, festgelegt werden, dass eine eventuelle Erniedrigung solcher Pensionszahlungen keineswegs die entsprechenden Summen für anderweitige militärische Verwendung freiwerden lasse, dass solche Ersparnisziffern vielmehr von der Gesammtsumme des zulässigen Kriegsbudgets in Abzug gebracht werden müssten.

ben ja doch stets auch Friedensbedürfnissen zugute. Freilich wäre damit eine gewisse Begünstigung Russlands gegeben, dessen Wehrmachtsausgestaltung ja in hohem Grade vom Ausbau der Bahnen abhängt. Aber gerade Russlands Truppenzahl und Kriegsbudget sind ja bisher im Verhältnis zum Umfang und der Einwohnerzahl des Reiches stark unter jenen Ziffern geblieben, die Deutschland oder Frankreich entsprechen würden und ohne eine einvernehmliche Begrenzung der Rüstungen würde Russlands Ziffer stärker steigen als die der anderen Länder. Wenn man es hieran verhindert, kann man ihm andererseits den Ausbau der Bahnen zubilligen. Der Vorsprung Deutschlands, wie er vor dem Kriege bestand, würde ja allerdings durch die dauernde Festhaltung der von England während des Krieges vorgenommenen Heeres-Umgestaltung und durch diese Erleichterung der russischen Mobilisierung wegfallen. Aber auch dies ist ein Phänomen, das sich bereits während des Weltkrieges durch die allmähliche Ausgleichung des deutschen Rüstungsvorsprungs vermöge der grössern materiellen Hilfsmittel der Gegner vollzogen hat. Das tatsächliche Kräfteverhältnis, wie es sich am Schlusse des Weltkrieges darstellen wird, würde also dadurch nicht zu ungunsten einer der kämpfenden Parteien, einer der künftigen Rivalen, verändert werden.

Indem so die Rüstungsbeschränkung *auf Umfang der vom Volkskörper abzugebenden Reserven an Menschenkraft und Volksvermögen beschränkt würde,* fiele das Interesse des internationalen Vertrages mit dem des wahrhaften Patrioten, welcher diese organischen

Volkskräfte lieber zu Wohlfahrts- und Kulturzwecken als zur Vorbereitung der Zerstörung verwendet sehen möchte, zusammen; die fortschrittlichen Parteien der Parlamente würden also zu Stützen des Vertrages werden.

Trotzdem liesse sich eine Gewährleistung desselben von aussen her zweifellos nicht entbehren. Eine eigene *Ueberwachungsstelle für Rüstungsbegrenzung* wäre im Rahmen der internationalen Exekutivgewalt zu errichten; Inspektoren aus neutralen Ländern wären ihr beizugeben, welche sich an Ort und Stelle sowie durch Einsicht in die Rechnungsabschlüsse der einzelnen Staaten über die Einhaltung der fixierten Maximalziffern zu informieren hätten. Ein Gerichtshof wäre ferner mit der Entscheidung aller Streitfälle, die sich zwischen seinem Amte und den Regierungen der einzelnen Staaten über Fragen der Rüstungsbegrenzung ergeben könnten, zu beauftragen. Zweckmässiger Weise könnte er zu gleicher Zahl aus Delegierten der höchsten Gerichtshöfe und aus fachmännisch gebildeten Delegierten der Kriegsministerien zusammengesetzt werden. Da es sich nicht um Entscheidung von Machtfragen, sondern um *tatsächlichen Befund*, resp. reine *Rechtsfragen* handeln würde, so könnte von einer zahlenmässig gesicherten Position der Grossmächte abgesehen werden. Eventuell könnten sogar die Beisitzer des Gerichtshofes *nur* aus neutralen Staaten gewählt werden, um jeden Verdacht der Parteinahme für oder wider die im Vordergrunde des Wettkampfes stehenden Grossmächte auszuschalten. In ganz besonders wichtigen prinzipiellen Fragen, z. B., hinsichtlich der Beur-

teilung der Jugendwehr und Kadettenkorps, durch deren Erweiterung man die Begrenzung der stehenden Armeen zu umgehen vermöchte, könnte von seiten der Ueberwachungsstelle oder der interessierten Mächte selbst eine gesetzliche Regelung, resp. *Ergänzung des Abrüstungsvertrages durch die zur Ausbildung des Völkerrechts berufenen Konferenzen des Staatenverbandes* angeregt werden.

Im Zusammenhange mit diesen Festlegungen dürfte dann auch die Frage der *Rüstungsindustrie* zur Beratung gelangen. Von vielen Seiten wird bekanntlich gefordert, dass dieselbe verstaatlicht werde, um damit das finanzielle Interesse der Rüstungslieferanten an einer Erweiterung der militärischen Rüstung auszuschliessen, die Presse von korrumpierenden Einflüssen zu befreien usw. Auch finanzielle Gesichtspunkte sprechen für Verstaatlichung; viele Millionen Ersparnisse könnten zweifellos durch sie zugunsten der Militärbudgets gemacht werden. Gerade dies Moment muss jedoch den wahren Freund der Abrüstung bedenklich stimmen. Wenn das Kriegsbudget gesetzlich begrenzt wird, werden die Kriegsministerien ohnehin auf Mittel und Wege sinnen, un mit den ihnen zur Verfügung gestellten relativ beschränkten Mitteln doch möglichst viele und gute Waffen zu erstellen und nahe wird es ihnen liegen, zu diesem Zwecke den Unternehmergewinn der Fabrikanten auszuschliessen und die Waffen in eigener Regie herzustellen. Man wird sie daran nicht hindern können; aber soll man wirklich eine Methode, *welche die Herstellung eines vergrösserten Ausmasses von Kriegsbedarf erleichtert,* vonseiten der Rüstungsgegner

durch internationale Vereinbarung *erzwingen?* Besser erscheint es mir, auf diesem Felde keinen für die eigene Sache zwecklosen Kampf zu suchen, die Schwierigkeiten des Werkes und die Widerstände, die sich ihm entgegensetzen, nicht dadurch künstlich zu vermehren, dass man in das Wespennest der am Rüstungswesen hängenden Privatinteressen sticht und der Abrüstungssache damit weitere Feinde erschafft. Die Frage der Verstaatlichung der Rüstungsindustrie wäre also besser aus dem internationalen Vertrage fortzulassen und *der Entschliessung der einzelstaatlichen Parlamente zu überantworten.*

II. SEEFLOTTEN.

Die Möglichkeiten einer Beschränkung des Rekrutenkontingents und das Marinebudgets sind für die Seekriegsmittel in gleicher Weise wie für die Streitmittel des Landkrieges vorhanden. Es fragt sich nur, ob man für die Flotten nicht weiter als für die Landarmeen gehen könne, ob die für letztere unmögliche Begrenzung der Bewaffnung angesichts der leichtern Uebersichtlichkeit des Seewesens doch möglich ist, resp. ob man, wenn schon nicht die Bewaffnung der Schiffe, so doch ihre *Zahl* begrenzen könnte [1]). Der Anreiz ist ja sehr gross. Denn gerade im Wettlaufe der Grosskriegsschiffe hat sich vor dem Weltkrieg der Rüstungswahn in der allerschärfsten Weise geäussert.

Gewiss könnte man den Bau neuer Schiffe (oder

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[1]) Ein derartiges Abkommen zwischen den Vereinigten Staaten und Kanada, was die kanadischen Seen anlangt, ist, wie eingangs erwähnt, seit dem Jahre 1817 in Kraft.

den Bau von Schiffen, deren Tonnenzahl ein gewisses Ausmass übersteigt) prinzipiell untersagen, res. bloss den Ersatz veralteter Fahrzeuge nach Ablauf gewisser festzulegender Fristen durch neue, weder grössere, noch stärker bestückte Kampfeinheiten gestatten. Das würde aber wieder der Schwierigkeit begegnen, dass man eine Seemacht kaum daran hindern kann, ihr bestehendes Schiffsmaterial auszubauen, zu modernisieren, zu vervollkommnen. Liesse sich auch bei den Grosskampfschiffen die einfache Kontrolle der Zahl leicht durchführen, so wäre dies auf Torpedofahrzeuge und Unterseeboote ohne eine sehr peinvolles Misstrauen dokumentierende Kontrolle der Schiffswerften schwer durchführbar. Einfacher erscheint es wieder, bloss das *Marinebudget* zu begrenzen und damit aus der Kontrolle die störenden Eingriffe in die interne Organisation des Seekriegswesens auszuschalten und dieselbe nur auf dem so unendlich minder dornigen Gebiet der Geldbewilliging durch die Parlamente und der Kontrolle der Staatsrechnungen einzusetzen. So bliebe es jedem Staate unbenommen, diejenigen Schiffseinheiten zu bauen, die gerade für seine Küstenkonfiguration oder seine strategischen Ziele entscheidend wichtig sind, z. B., den wesentlichen Teil des Budgets in Unterseebooten anzulegen, wenn es sich ihm nur um Küstenverteidigung und eventuelle Störung des feindlichen Handels handelt oder sich auf Grosskampfschiffe zu konzentrieren, wenn die Beherrschung der See als Zweck der ganzen Rüstungen erscheint.

Den Staaten würde so die Empfindung der völligen

Freiheit belassen und die Begrenzung des Budgets selbst würde in so hohem Grade ihren eigenen Wirtschaftsinteressen zugute kommen, dass sie diese Kontrolle, resp. das Bewusstsein, dass sich dieselbe ja in gleicher Weise auf die Rüstungen der Nebenbuhler erstreckt, eher als Woltat empfinden würden.

III. LUFTKRIEGSWESEN.

Die bei § 1 und 2 signalisierten Schwierigkeiten einer vertraglichen Begrenzung der Kriegs*mittel* gelten in gleicher Weise auch für den Luftkrieg. Gewiss wäre es an sich denkbar, die Zahlen der lenkbaren Luftschiffe und die der Flugzeuge vertraglich zu begrenzen, aber die Staaten würden sich dann auf Ausbildung besonders vervollkommneter, wenn auch besonders kostspieliger Luftschiffstypen werfen, um angesichts der gebundenen *Quantität* den Gegner durch besondere *Qualität* zu übertrumpfen. Ein wirksam durchgeführtes Verbot des Bombenwurfes von Luftschiffen würde freilich den Reiz zur Ausgestaltung der Luftwaffen vermindern, aber die Erfahrungen dieses Krieges haben gezeigt, dass solche Verbote, selbst wenn es sich nur um den Schutz offener Städte handelt, unter tausend Vorwänden, als "Repressalien" usw. umgangen werden können, wie die Bestimmungen des Kriegsrechts überhaupt. Eine internationale Exekutivgewalt mit der Kontrolle solcher Kriegsrechtsbestimmungen zu betrauen, wäre eine überaus dornige und schwierige Aufgabe und keinem Staate könnte es verargt werden, wenn er solchen Bestimmungen

das Vertrauen versagen und lieber seine eigenen Luftkriegsmittel verbessern würde. Die einzige praktisch durchführbare Methode liegt wieder in der *Begrenzung des Luftkriegsbudgets* und der Kontrolle derselben anlässlich der Geldbewilligung in den Parlamenten.

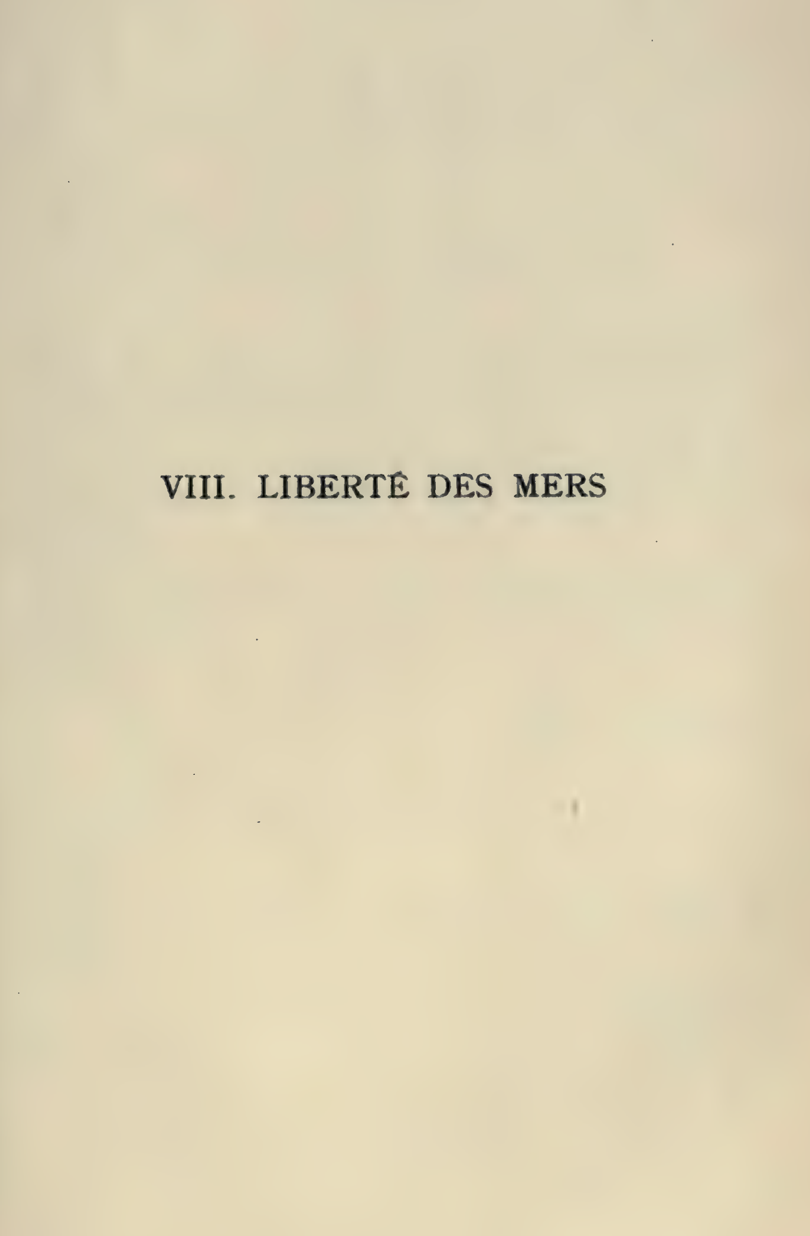
Fassen wir all diese Ueberlegungen zusammen, so kommen wir zu folgenden kurzen Vorschlägen: Das *Ausmass der stehenden Heere* zu Land und Wasser am 1. August 1914 werde für die Zukunft als Maximum festgelegt und für jedes weitere Jahr eine Reduktion um 5 % in Aussicht genommen, (Spezielle Bestimmungen für England, das seine Rüstung während des Krieges umgestaltete). Desgleichen werde das Heeres-, Marine- und Luftkriegs*budget* vom 1. August 1914 als Maximum festgelegt (mit 5 %iger alljährlicher Verminderung), eventuell für das *Luft*kriegsbudget — angesichts der Ausbildung dieser Waffe im Kriege — eine Maximalziffer festgesetzt, die das Doppelte des Standes vom 1. August 1914 betrüge.

Die Kontrolle dieser Festsetzungen würde einer *internationalen Ueberwachungsstelle,* die aus richterlichen Delegierten und militärischen Sachverständigen bestünde, zu übertragen; deren Inspektoren hätten jedoch von Eingriffen in die interne Organisation der einzelnen Militärstaaten abzusehen und sich im wesentlichen auf die Kontrolle der Geld- und Mannschaftsbewilligung durch die Parlamente, der Staatsrechnungsabschlüsse sowie der offen zutage liegenden Momente des Mannschaftsbestandes und der Geldbewegung zu beschränken. In prinzipiellen Fragen wäre

ein Appell an die gesetzgebenden Konferenzen des Staatenverbandes zuzulassen, resp. Ergänzungen des Abrüstungsvertrages von ihm vorzunehmen.

So könnte viele Menschenkraft und Wirtschaftsmacht für kultur- und Sozialpolitische Zwecke gerettet und es könnten viele für die Bewahrung des Friedens gefährliche Misstrauenskräfte ausgeschaltet werden.

VIII. LIBERTÉ DES MERS



THE FREEDOM OF THE SEAS

THE IMMUNITY OF PRIVATE PROPERTY AT SEA IN TIME OF WAR

BY

MRS. FANNIE FERN ANDREWS, U. S. A.

If at the close of the present war the ruling desire is for the establishment of a permanent peace, the exemption from capture of private property at sea, not contraband of war, will receive favorable disposition. The freedom of the seas is a necessary instrument of a durable peace.

Under existing law: (a) Public vessels of the enemy may be captured or destroyed, except the following when innocently employed:

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in scientific work.
3. Properly designated hospital ships.
4. Vessels exempt by treaty or special proclamation.

(*b*.) Private vessels of the enemy may be captured, except the following when innocently employed:

1. Cartel ships designated for and engaged in exchange of prisoners.
2. Vessels engaged in religious, philanthropic, and scientific work.
3. Properly designated hospital ships.
4. Small coast fishing vessels.

5. Small boats employed in local trade, e. g., transporting agricultural products.

6. Vessels exempt by treaty or special proclamation.

According to the Declaration of Paris of 1856:

2. The neutral flag covers enemy's goods, with the exception of contraband of war.

3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

A blockade alters these articles of the Declaration of Paris, for any ship, neutral or not, attempting to break a blockade, is subject to capture with its cargo. The Declaration of Paris bound only those states which signed it.

The United States declined because the government desired a provision exempting all private property at sea from capture. In the War of 1898, the United States announced that she would abide by these rules, and Spain made a similar announcement. The United States has for many years advocated the exemption of all private property, not contraband of war, from capture on the high seas. At the First Hague Conference the American representatives were authorized to propose to the Conference the principle of such exemption. Early in the Conference, the American Commissioners found that it would be impossible to secure unanimity upon this question. The following communication was addressed to the President of the Conference:

"June 20, 1899.

"To His Excellency, M. de Staal, Ambassador, etc., etc., President of the Peace Conference.

"Excellency, — In accordance with instructions from their Government, the Delegation of the United States desire to present

to the Peace Conference, through Your Excellency as its President, a proposal regarding the immunity from seizure on the high seas, in time of war, of all private property except contraband.

"It is proper to remind Your Excellency as well as the Conference, that in presenting this subject we are acting not only in obedience of instructions from the present Government of the United States but also in conformity with a policy urged by our country upon the various Powers at all suitable times for more than a century.

"In the Treaty made between the United States and Prussia in 1785 occurs the following clause:

",Tous les vaisseaux marchands et commerçants, employées à l'échange des productions de différents endroits, et, par conséquent, destinés à faciliter et à répandre les nécessités, les commodités et les douceurs de la vie, passeront librement et sans être molestés. .... Et les deux Puissances contractantes s'engagent à n'accorder aucunes commissions à des vaisseaux assurés en course, qui les autorisent à prendre ou à détruire ces sortes de vaisseaux marchands ou à interrompre le commerce.' (Art. 23.)

"In 1823 Mr. Monroe, President of the United States, after discussing the rights and duties of neutrals, submitted the following proposition:

" ,Aucune des parties contractantes n'autorisera des vaisseaux de guerre à capturer ou à détruire les dits navires (de commerce et de transport), ni n'accordera ou ne publiera aucune commision à aucun vaisseau de particuliers armé en course pour lui donner le droit de saisir ou détruire les navires de transport ou d'interrompre leur commerce.'

"In 1854 Mr. Pierce, then President, in a message to the Congress of the United States, again made a similar proposal.

"In 1856, at the Conference of Paris, in response to the proposal by the greater European Powers to abolish privateering, the Government of the United States answered, expressing its willingness to do so, provided that all property of private individuals not contraband of war, on sea as already on land, should be exempted from seizure.

"In 1858, under the administration of Mr. Buchanan, then President, a Treaty made between the United States and Bolivia contemplated a later agreement to relinquish the right of capturing private property upon the high seas.

"In 1871, in her Treaty with Italy, the United States again showed adhesion to the same policy. Article 12 runs as follows:

" ,The High Contracting Parties agree that, in the unfortunate

event of a war between them, the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure, on the high seas or elsewhere, by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party.'

"It may be here mentioned that various Powers represented at this Conference have at times indicated to the United States a willingness, under certain conditions, to enter into arrangements for the exemption of private property from seizure on the high seas.

"It ought also to be here mentioned that the doctrine of the Treaty of 1871 between Italy and the United States had previously been asserted in the Code of the Italian Merchant Navy as follows:

" ,La capture et la prise des navires marchands d'un Etat ennemi par les navires de guerre seront abolies par voie de réciprocité à l'égard des Etats qui adoptent la même mesure envers la marine marchande italienne.La réciprocité devra résulter de lois locales, de conventions diplomatiques, ou de déclarations faites par l'ennemi avant le commencement de la guerre. (Art. 211.)

"And in the correspondence with Mr. Middleton, the Representative of the United States at the Russian Court, Count Nesselrode, so eminent in the service of Russia, said that the Emperor sympathized with the opinions and wishes of the United States, and that, 'as soon as the Powers whose consent he considers as indispensable shall have shown the same disposition, he will not be wanting in authorizing his ministers to discuss the different articles of an act which will be a crown of glory to modern diplomacy.'

"In this rapid survey of the course which the United States have pursued during more than a century, Your Excellency will note abundant illustration of the fact above stated—namely, that the instructions under which we now act do not result from the adoption of any new policy by our Government, or from any sudden impulse of our people, but that they are given us in continuance of a policy adopted by the United States in the first days of its existence and earnestly urged ever since.

"Your Excellency will also remember that this policy has been looked upon as worthy of discussion in connection with better provisions for international peace, not only by eminent statesmen and diplomatists in the active service of various great nations, but that it has also the approval of such eminent recent authorities in international law as Bluntschli, Pierantoni, De Martens, Bernard,

Massé, De Laveleye, Nys, Calvo, Maine, Hall, Woolsey, Field, Amos, and many others.

"We may also recall to your attention that the Institute of International Law has twice pronounced in its favor.

"The proposition which we are instructed to present may be formulated as follows:

" ,The private property of all citizens or subjects of the signatory Powers, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of any of the said signatory Powers. But nothing herein contained shall extend exemption from seizure to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of any of the said Powers.

" ,La propriété privée de tous les citoyens ou sujets des Puissances signataires, à l'exception de la contrabande de guerre, sera exempte en pleine mer ou autre part de capture ou de saisie par les navires armés ou par les forces militaires des dites Puissances. Toutefois cette disposition n'implique aucunement l'inviolabilité des navires qui tenteraient d'entrer dans un port bloqué par les forces navales des susdites Puissances, ni des cargaisons des dits navires.'

"As regards the submission of this question to the Conference at this time, we most respectfully present the following additional observations.

"At the second session of the Conference held on the 20th of May, it was decided in connection with the establishment of the three Commissions to which were referred the various articles of the Russian circular of December 30, 1898/January 11, 1899, as follows:

" ,Il est entendu qu'en dehors des points mentionnées ci-dessus, la Conférence ne se considère comme compétente pour l'examen d'aucune autre question. En cas de doute la Conférence aurait à décider si telle ou telle proposition émise dans les commissions rentrerait ou non dans le cadre tracé par ces points.'

"The fact that we have received the instructions herein referred to, from the President of the United States, shows that the scope of the Conference was believed by our Government to be wide enough to include this question.

"The invitation from the Government of the Netherlands in response to which we are here invites us as follows, 'afin de discuter les questions exposées dans la seconde circulaire russe du 30 décembre 1898/11 janvier 1899, ainsi que toutes autres questions se rattachant aux idees émises dans la circulaire du 12/24 Août 1898; avec exclusion, toutefois, des délibérations de tout ce qui touche aux

rapports politiques des Etats ou à l'ordre de choses établi par les traités.'

"We respectfully submit that a rule of war relating to the amelioration of its hardships as practised upon the sea attaches as fairly to the ideas put forth in the Russian circular of August 12/24, 1898, as the stiputalions of the Geneva Convention or the Rules of War relating to operations on land of the Brussels Conference of 1874. If the Russian circular of December 30, 1898/January 11, 1899, did not specifically mention this question, the Government of the United States has assumed that it was because the Russian Government wished the Conference to decide for itself whether the question should be discussed.

"It would certainly appear from the foregoing statements that there is here at least a case of doubt calling for submission to the Conference as is contemplated in the resolution adopted by the Conference on the 29th of May, and in view of this fact the Delegation of the United States of America respectfully request that the matter be submitted by Your Excellency to the proper Commission or to the Conference itself, that it may be decided whether our proposal is among those which should now be considered.

"In submitting this request allow us to present to Your Excellency the assurance of our most distinguished consideration.

"ANDREW D. WHITE, *President.*
"SETH LOW.
"STANFORD NEWEL.
"A. T. MAHAN.
"WILLIAM CROZIER.
"FREDERICK W. HOLLS, *Secretary.*"

(Holls' The Peace Conference at The Hague, p. 307.)

This letter was referred to the Second Committee, and at a meeting of the Conference on July 5, M. de de Martens of Russia reported from this Committee that it did not consider itself competent to take up the subject, but that the Committee had instructed him to report in favor of a resolution, expressing the hope that the whole subject would be included in the programme of a future Conference.

Mr. White said, in speaking for the American Commission:

> "In the name, then, of the Delegation of the United States, I support the motion to refer the whole question to a future conference. And in doing so permit me, in the name of the nation whi ch I represent, to commend the consideration of this whole subject to all those present in this Conference, and especially to the eminent lawyers, to the masters in the science of International Law, to the statesmen and diplomatists of the various countries here represented, in the hope that this question may not only be contained in the programme of the next Conference which shall be assembled, but that it shall receive thorough discussion based upon full examination of the many questions involved, and from all points of view. The solution of this great question will be an honor to all those who have participated or who shall participate in it, and a lasting benefit to all the nations of the earth."
>
> (Ibid., p. 320.)

Count Nigra of Italy cordially supported the proposition of the Second Committee, as reported by. M. de Martens. He called attention to the fact that the Italian Government did not only proclaim its respect for private property on the high seas diplomatically, but had sanctioned the principle in its laws. He referred particularly to an article in the Treaty of Commerce between Italy and the United States, which provides, under the reserve of reciprocity, a recognition of the inviolability of such property. He desired that official notice should be taken of this declaration.

Lord Pauncefote of England annouced that in the absence of instructions from their Government, the British delegates were obliged to abstain from voting. M. Bourgeois of France made a similar declaration on behalf of himself and his colleagues. Thereupon the report of the Committee was adopted unanimously.

The proposition was inserted in the form of a "wish" in the Final Act of the First Hague Conference, as follows:

> "5. The conference expresses the wish that the proposal, which contemplates the declaration of the inviolability of private property in naval warfare, may be referred to a subsequent conference for consideration."
> (The Hague Conventions and Declarations of 1899 and 1907, Scott.

In accordance with the Final Act of the First Hague Conference, the immunity of private property at sea was included in the programme of the Second Hague Conference in 1907. The subject was referred to the fourth committee.

Mr. Choate, on June 28, 1907, delivered an eloqent adddress, in favor of the immunity of private property at sea. (Deuxième Conférence Internationale de la Paix, Tome III,. pp. 750—764.) After presenting the American propositon, expressed in almost the same words as in 1899, Mr. Choate, representing the American delegation, spoke of the universal importance of the principle, saying:

> "This proposition involves a principle which has been advocated from the beginning by the Government of the United States and urged by it upon other nations and which is most warmly cherished by the American people, and the President is of opinion that whatever may be the apparent specific interest of our own or of any other country for the time being, the principle thus declared is of such permanent and universal importance that no balancing of the chances of problable loss or gain in the immediate future on the part of any nation should be permitted to outweigh the considerations of common benefit to civilization which call for the adoption of such an agreement."
> (Deuxième Conférence Internationale de la Paix, Tome III,p.766.)

George Grafton Wilson, Professor of International

Law at Harvard University, and Lecturer on International Law for United States Naval War College, Cambridge, Mass., analyzes Mr. Choate's address and the subsequent discussions as follows:

"Mr. Choate also speaks of this doctrine as 'our favorite proposition,' 'the traditional policy of the United States,' and at the same time saying, 'I ought most frankly to concede that the United States has never been able to put this policy into practical operation'. Mr. Choate cites the opinion of statesmen and writers in favor of exemption and argues that the reasons for exemption of private property on land apply to similar property at sea. He urges the exemption.

> First, on humanitarian grounds; secondly, we place it on a ground more important still, of the unjustifiable interference with innocent and legitimate commerce, which concerns not alone the nation to which the ship belongs, but the whole civilized world. We insist upon our proposition in the third place as a direct advance toward the limitation of war to its proper province, a contest between the armed forces of the States by land and sea against each other and against the public property of the respective states engaged. And, finally, we object to the old practice and insist upon our demand for its abolition on the ground that it is now no longer necessary, and that it tends to invite war and to provoke new wars as a natural result of its continuance.
>
> (Deuxième Conférence Internationale de la Paix, Tome III. pp. 774—775.)

"Mr. Choate supports his position by arguments, some of which have a bearing upon the military significance of this doctrine of exemption:

> Apart from all historical and ethical points of view, it may welbe claimed that there is another strong ground in support of the immunity of private property at sea, not needed for military purpol

ses, for which we contend. From economical considerations it is no longer worth the while of maritime nations to construct and maintain ships of war for the purpose of pursuing merchant ships which have nothing to do with the contest. The marked trend of naval warfare among all great maritime nations at the present time is to dispense with armed ships adapted to such service, and to concentrate their entire resources upon the construction of great battleships whose encounters with those of their adversaries shall decide any contest, thus confining war, as it should be, to a test of strength between the armed forces and the financial resources of the combatants on sea and land. It is probable that, if the truth were known, there has been an actual diminution by all the maritime nations in the construction of war vessels adapted to the pursuit of merchantmen, and, indeed, a sale or breaking up of such vessels which had been for some time in service. Indeed, none of the great navies now existing could afford to employ any of their great and costly ships of war or cruisers in the paltry pursuit of merchantmen scattered over the seas. The game would not be worth the candle and the expense would be more than any probable result.

This presents in another form the idea already referred to that war has come to be, as it should be, a contest between the nations engaged and not between either nation and the noncombatant citizens or individuals of the other nation, and it results from it that the noncombatant citizens should be let alone, and that no amount of pressure that can be brought to bear upon them will have any serious effect in shortening the controversy. (Ibid., p. 777.)

"Of the proposition that the 'most effective way of preventing war is to make it as terrible as possible,' Mr. Choate, after showing that the trend of the Geneva and other conventions is in the opposite direction, says:

Of course there is no truth or sanity in such a brutal suggestion. Our duty is not to make war as horrible as possible, but to make it as harmless as possible to all who do not actually take part in it, to prevent as far as we can, to bring it to an end as speedily as we can, to mitigate its evils as far as human ingenuity can accomplish that result, and to limit the engines and instruments of war to their legitimate use—the fighting of battles and the blockading and protection of seacoasts. (Ibid., p. 778.)

"Other arguments are also presented, and as these constitute what is regarded as an official statement of the position of the United States, the paragraphs concluding Mr. Choate's address may be cited:

Again, it is urged that the retention of this ancient right of capture and detention is necessary as the only means of bringing war to an end. That when you have destroyed the fleets of your enemy and conquered its armies it has no object in suing for peace as long as its commerce and its communication by transportation with other nations in the way of trade is left undisturbed.

But this seems to us to be a purely fanciful and imaginary proposition. The history of modern wars, and, in fact, of all wars, shows that the decisive victory over an enemy by the destruction of his fleets and the defeat of his armies is sure to bring about peace. The test of strength to which the parties appealed has thereby been decided and there is no further object in continuing the war.

The picking up or destruction of a few harmless and helpless merchantmen upon the sea, will have no appreciable effect in reducing the government and nation to which they belong to subjection, if the defeat of fleets and armies has not accomplished that result. Besides, there is a limit to the legitimate right of even the victor upon the seas for the time being to employ his power for purposes of destruction. Victory in naval battles is one thing, but ownership of the high seas is another. In fact, rightly considered, there is no such thing as ownership of the seas. According to the universal judgment and agreement of nations they have been and are always free seas—free for innocent and unoffending trade and commerce. And in the interest of mankind in general they must always remain so.

Again, it has been urged that the power to strike at the mercantile marine of other nations is a powerful factor in deterring them from war that the merchants having such great interests involved, liable to be sacrificed by the outbreak of war, will do their utmost to hold their government back from provoking to or engaging in hostilities. But this, we submit, is a very feeble motive. Commerce and trade are always opposed to war, but have little to do with causing or preventing it. The vindication of national honor, accident, passion, the lust of conquest, revenge for supposed affront, are the causes of war, and the commercial interests which would be put in jeopardy by it have seldom, if ever, been persuasive to prevent it.

And as to its continuance or termination, commerce really has nothing to do with it. When the military and financial strength of one side is exhausted, the war, according to modern methods, must come to and end, and the noncombatant merchants and traders have no more to do with bringing about the consummation than the clergymen and schoolmasters of a nation.

Once more, it is said that the bloodless capture of merchant ships and their cargoes is the most humane and harmless employment of military force that can be exercised, and that in view of the community of interest in commerce to which we have referred and the practice of insurance in distributing the loss, the effect of such captures upon the general sentiment and feeling of the nation to which they belong is most effective as a means of persuading their government to make peace.

But we reply that bloodless though it be it is still the extreme of oppression and injustice practiced upon unoffending and innocent individuals, and that it has no appreciable effect in reaching or compelling the action of the Government of which the sufferers are subjects.

We appeal, then, to our fellow delegates assembled here from all nations in the interest of peace, for the prevention of war, and the mitigation of its evils to take this important subject into serious consideration, to study the arguments that will be presented for and against this proposition, which has already enlisted the sympathy and support of the people of many nations, to be guided not wholly by the individual interest of the nations that they represent, but to determine what shall be for the best interest of all the nations in general and whether commerce, which is the nurse of peace and international amity, ought not to be preserved and protected, although it may require from a few nations the concession of the remnant of an ancient right, the chief value of which has long since been extinguished.

In the consideration of such a question, the interest of neutrals, who constitute at all times the great majority of the nations, ought to be first considered, and if they will declare on this occasion their adhesion to the humane and beneficent proposition which we have offered, we may rest assured that, although we may fail of unanimous agreement, such an expression of opinion will represent the general judgment of the world and will tend to dissuade those of us who may become belligerents from any further exercise of this right, which is so abhorrent to every principle of justice and fair play. (Ibid., p. 778—779.)

"*Replies to the American proposition*, 1907. — The reception of Mr. Choate's address was most cordial, though not all the delegations were able to accept its conclusions. Some offered reasons of policy, others offered reasoned arguments. While political reasons were not supposed to influence the deliberations, it is evident that national conditions could not be disregarded.

"A Colombian delegate concluded a considerable discussion of Mr. Choate's address with the following words:

> Pour en finir, Messieurs, nous n'acceptons pas la proposition de M. Choate parce que nos conditions et nos circonstances ne nous permettent pas ce beau luxe en faveur des principes abstraits de la justice et de l'humanité. On peut être apôtre et chercher le martyre individuellement; quand on représente un pays, on a le devoir de défendre ses intérêts; dans le cas présent, il s'agit de politique internationale et non pas de philanthropie. (Deuxième Conférence Internationale de la Paix, Tome III, p. 792.)

„M. Renault, of the French delegation, maintained that the analogy between war on land and on sea was not complete, that the disturbance of the economic life of the community by capture of merchant ships was a means of coercion which might prevent war or hasten peace, and one could not say it was in a high degree inhumane. As the ships may easily be converted into war vessels, they may constitute a potential means of defense the loss of which would hasten the close of hostilities. M. Renault was opposed to the ancient idea of prize money. He closes his address as follows:

> D'autre part, c'est dans l'intérêt général de l'Etat en même temps que dans le leur que les armateurs et chargeurs des navires

capturés ont continué leurs opérations malgré la guerre. Il ne serait donc pas juste qu'ils subissent seuls les conséquences de la capture. Aussi l'idée que l'Etat, dans son ensemble, doit subir les conséquences préjudiciables de la guerre, non seulement en tant qu'elles se sont produites directement contre l'Etat lui-même et ses établissements, mais encore en tant qu'elles ont atteint les particuliers, s'affirme de plus en plus; on peut différer sur les moyens de la réaliser, mais il n'y a guère de doute sur le principe lui-même.

Si ces considérations sont, comme nous le croyons, justes, le droit de capture apparaît comme une mesure dirigée par un Etat belligérant contre un autre état belligérant, cette mesure faisant partie de l'ensemble des opérations par lesquelles un Etat s'efforce de réduire son adversaire à composition et n'ayant par elle-même aucun caractère particulier de rigueur. Il n'y a donc pas, suivant nous, de raison suffisante pour y renoncer, tant que l'entente nécessaire à laquelle nous avons fait allusion au début et à la formation de laquelle nous sommes prêts à concourir, ne se sera pas réalisée. (Ibid., p. 794).

"Sir Edward Fry, of the English delegation, said:

Je demande la parole seulement sur un sujet de nos débats. Le Délégué américain que nous venons d'entendre avec tant d'intérêt a beaucoup parlé de la cruauté de l'exercice du droit de capturer la propriété privée. A mon avis c'est un mal-entendu. Il est vrai que dans toutes les opérations de la guerre, il y a quelque chose de barbare, mais de toutes les opérations il n'y en a pas une qui soit aussi humaine que l'exercice de ce droit. Considérez, je vous prie, ces deux cas: l'un, la capture d'un vaisseau marchand sur mer; l'autre, les opérations d'une armée ennemie. Dans le premier cas, vous voyez une force majeure contre laquelle il est impossible de combattre; personne n'est tué, même personne n'est blessé; c'est une affaire pacifique. De l'autre côté, qu'est-ce que vous voyez? Vous voyez le terrain désolé, le bétail détruit, les maisons brulées, les femmes et les enfants fuyant devant les soldats ennemis et peut-être des horreurs sur lesquelles je voudrais garder le silence. Se plaindre donc de la capture des vaisseaux marchands sur mer, et ne pas interdire la guerre sur terre, c'est choisir le plus grand des deux maux. (Ibid. p. 800.)

"The delegate from the Argentine Republic took a similar position. (Ibid, p. 810).

"*Position of Netherlands,* 1907. — The Netherlands position in the Second Hague Conference was that it shared fully the sentiments and adhered to the principles of inviolability of private property as set forth by the American delegation:

> La délégation des Pays-Bas est favorable à toute proposition établissant le principe de l'inviolabilité de la propriété privée sur mer.
>
> Afin que la possibilité de transformer en temps de guerre des navires de commerce en croiseurs auxiliares ne puisse être un motif pour ne pas accepter ce principe, la délégation soumet aux considérations de la Commission la proposition suivante:
>
> Aucun navire marchand ne peut être capturé par une partie belligérante pour le seul fait de naviguer sous pavillon ennemi s'il est muni d'un passeport délivré par l'autorité compétente de son pays, dans lequel passeport il est déclaré que le navire ne sera pas transformé en vaisseau de guerre ni utilisé comme tel pendant toute la durée de la guerre. (Deuxième Conférence Internationale de la Paix, Tome III, p. 1142.)

"*Brazil.* — The Brazilian delegation was favorable to assimilating the status of private property at sea to the status of private property on land. He refers in his proposition to the articles of The Hague convention relative to the laws and customs of war on land:

> B. Lorsque le capitaine d'un navire ou d'une flotte belligérante se trouvera dans la nécessité de réquisitionner, dans le cas prévu à l'article 23, lettre g, de la susmentionné convention, c'est-à-dire dans le cas où la destruction ou la saisie de ces biens lui sont commandées par les exigences les plus impérieuses de la guerre, un vaisseau de commerce ennemi, sa cargaison, ou une portion quelconque de celle-ci, la réquisition sera constatée par celui qui la fait moyennant des reçus délivrés au capitaine du vaisseau qu'on aura saisi, ou dont on aura saisi les marchandises, avec tous les détails possibles pour assurer aux parties intéressées leur droit à une juste indeminité.
>
> C. Cette clause s'applique aux marchandises neutres, qui se

trouveront au bord des vaisseaux marchands ennemis requisitionés.

Le capitaine du navire ou de la flotte de guerre, qui aura déterminé la réquisition, est tenu de faire mettre à terre, dans un des ports les plus proches, les officiers et l'équipage du bâtiment saisi, avec les ressources nécessaires pour leur retour au pays auquel il appartenait.

"*Denmark.* — Denmark was in favor of exemption if it could be by common agreement.

"*Belgium.* — The Belgian delegate submitted a set of rules which had in view that private vesssels of the enemy could be seized and retained by a belligerent, but were to be restored at the close of hostilities. The crews of such vessels were to be liberated on condition that they would take no part in the war.

"*France.* — The French delegation, admitting that war was not for the profit of individuals and that the loss should not be borne by individuals, showed a disposition to accept the American proposition in case of unanimity. The delegation made a reasoned proposition:

Considérant que, si le droit des gens positif admet encore la légitimité du droit de capture appliqué à la propriété privée ennemie sur mer, il est éminemment désirable que, jusqu'à ce que l'entente puisse s'établir entre les Etats au sujet de sa suppression, l'exercice en soit subordonné à certaines modalités.

Considérant qu'il importe au plus haut point que, conformément à la conception moderne de la guerre qui doit être dirigée contre les Etats et non contre les particuliers, le droit de prise apparaisse uniquement comme un moyen de coercition pratiqué par un Etat contre un autre état;

Que, dans cet ordre d'idées, tout bénéfice particulier au profit des agents de l'Etat qui exercent le droit de prise devrait être exclu et que les pertes subies par les particuliers de chef des prises devraient finalement incomber à l'état dont ils relèvent.

La Délégation française a l'honneur de proposer à la Quatrième

Commission d'émettre le vœu que les états qui exerceront le droit de capture suppriment les part de prises attribuées aux équipages des bâtiments capteurs et prennent les mesures nécessaires pour que les pertes causées par l'exercice du droit de prise ne restent pas entièrement à la charge des particuliers dont les biens auront été capturés. (Ibid., p. 1148.)

"*Austria-Hungary.* — The Austro-Hungarian delegation proposed amendments to the French form:

Animée du vif désir de voir terminer la discussion de la Quatrième Commission sur l'inviolabilité de la propriété privée ennemie sur mer par une amélioration, si légère fût-elle, de l'état actuel, et estimant que le vœu proposé par la Délégation française renferme des éléments propres à arriver à ces fins, mais tenant compte toutefois de certaines objections que ce vœu lui semble avoir rencontré de la part d'un nombre considérable des membres de cette Commission, la Délégation d'Autriche-Hongrie a l'honneur de proposer les amendements suivants dans le texte émis par la Délégation de France:

(a) mettre après 'que les' au lieu de ‚Etats qui exerceront le droit de capture' les mots: ‚Puissances qui maintiennent la faculté de faire des prises';

(b) à la place de ‚prennent les mesures nécessaires' insérer les mots: ‚s'occupent à chercher un moyen praticable'; et

(c) au lieu de ‚du droit de prises' mettre ‚de cette faculté.'

"*Résumé of the Hague propositions,* 1907. — The president of the commission having the subject of the immunity of private property at sea under consideration at The Hague in 1907 was M. de Martens, a skilled and experienced Russian diplomat. He endeavored to give a résumé of the various propositions and arguments advanced before the commission. At the meeting of July 17, 1907, he spoke to the following effect:

La proposition américaine a suscité beaucoup d'autres propositions; la question a été posée en 1899, elle a été alors étudiée par la Première Conférence sous bénefice d'inventaire; huit années se

sont passées depuis, on a donc eu le temps de se préparer sur la question qui semble aujourd'hui épuisée. Il est incontestable, à raison des propositions intermédiaires qui ont été déposées, que l'application du principe de l'inviolabilité de la propriété privée sur mer ne réunit pas l'unanimité des suffrages; ce n'est pas à la Commission qu'il appartient de discuter les motifs qui peuvent faire valoir les différent Gouvernements, mais il n'en est pas moins vrai que sur cette question on rencontre des hésitations, des scrupules et même des craintes. Les Etats ont évidemmentl 'appréhension d'apporter une solution dont les conséquences leur sont inconnues; d'entrer dans les ténèbres. De nombreux auteurs ont écrit sur le principe de l'inviolabilité de la propriété sur mer; ils sont loin d'être d'accord entre eux, même s'ils appartiennent au même pays. Le Président rappelle qu'on a cité l'ouvrage qu'il a écrit il y a quarante ans; il était alors le partisan convaincu de l'inviolabilité, mais depuis cette longue époque il est devenu plus circonspect sur cette question délicate.

Les faits historiques qui viennent à l'appui de la thèse américaine, suggèrent quelques observations. Le traité que la Prusse signa avec les Etats-Unis en 1785 a consacré le principe de l'inviolabilité, mais il faut se rapeller que ce traité fut signé par un Roi philosophe et un Prince parmi les philosophes, qui du reste n'avaient guère d'illusions sur la portée pratique de leur accord; car ils savaient tous les deux qu'une guerre entre leurs deux pays n'était guère probable. On a encore cité une dépêche qui fut adressée en 1824 a M. Mittleton, ministre des Etats-Unis à Pétersbourg et dans laquelle le Comte Nesselrode exprimait toute sa sympathie pour le principe de l'inviolabilité de la propriété privée sur mer.

Mais il faut prendre aussi en considération la dépêche, datant de la même époque, où le Comte Nesselrode, écrivant au Comte Pozzo di Borgo, ambassadeur de Russie à Paris exclut l'éventualité d'un engagement ferme dans une question grosse de conséquences qu'on ne pourrait pas aisément calculer. En 1856, le Prince Gortchakoff a également exprimé son énergique sympathie pour l'abolition de la capture, mais, lui aussi, a entrevu les difficultés qu'elle suscitait.

Depuis 1785 jusqu'à aujourd'hui, le principe que discute la Commission n'a été mis qu'une fois en application, pendant la guerre entre la Prusse, l'Italie et l'Autriche en 1866. Ces Puissances ont déclaré au monde qu'il n'y aurait pas de capture des navires de commerce, mais cette guerre a été d'une si courte durée qu'elle ne peut être citée comme un précédent. L'argument le plus concluant que l'on a mis en avant a été la différence du régime qui

pendant la guerre régit la propriété sur terre et la propriété sur mer, mais cet argument repose sur un malentendu. La Conférence de 1899 a fondé, pour ainsi dire, une société d'assurances mutuelles contre les abus de la force pendant la guerre sur terre; néanmoins si on les compare avec ceux de la guerre sur mer, ils sont bien plus terribles. Que le territoire soit ou ne soit pas occupé par l'ennemi, quoique le pillage soit aujourd'hui interdit, les nécessités militaires que reconnaissent les articles 47, 48, etc. de la Convention de 1899, pèsent d'un poids très lourd sur le paysan comme sur le propriétaire, elles les infligent non seulement des souffrances morales mais des souffrances matérielles que les conventions ne peuvent pas supprimer au moment où la force prime le droit même. Si l'on n'admet pas le principe de l'inviolabilité de la propriété privée sur mer, les particuliers ont de nombreux moyens pour échapper aux conséquences de la guerre; ils peuvent notamment vendre leurs navires et les reconstruire à la fin des hostilités. Leur situation deviendra bien plus favorable si l'on supprime le droit de capture; elle sera même privilégiée, puisque leurs affaires augmenteront et se feront au détriment des entreprises continentales paralysées par l'invasion. C'est à la Commission d'examiner sous tous ses côtés la décision qu'elle va prendre en se conformant aux instructions que les Délégués ont reçues de leurs Gouvernements.

Le Président termine ainsi son discours:

Tel est, Messieurs, l'exposé impartial de toute la question sur laquelle vous allez vous prononcer. En vous présentant cet exposé des faits historiques et des considérations documentées, je n'avais nullement l'intention ni d'influencer votre vote, ni de me prononcer personnellement contre la prise en considération de la proposition (Annexe 10) de la Délégation des Etats-Unis d'Amérique. Je ne veux nullement prendre parti ni pour ni contre la proposition américaine. Mon devoir de Président de cette Commission m'imposa d'éclaircir le terrain sur lequel nous nous trouvons et de contribuer de mes faibles forces à une complète orientation sur tous les principaux faits et arguments développés devant vous sur cette très intéressante et très compliquée matière. (Ibid., p. 833—834.)"

(U. S. Naval War College-International Law, Topics and Discussions, 1913, pp. 117—126).

M. Henri Fromageot has well said of this discussion: "All the arguments in favor of immunity were sustained with an eloquence and a dialectical force difficult

to surpass." In concluding his official report, M. Fromageot says:

"The proposition of the United States of America (immunity), put first to vote, received from the forty-four states represented 21 yeas, 11 nays, 1 abstention, eleven states not responding to the roll call.

"In the absence of a number of votes sufficient to insure a unanimous agreement, or at least an accord well-nigh general, the commission passed to the Brazilian proposition (assimilation of naval to land warfare). The vote to take it into consideration having resulted in a fairly equal division of the votes cast, and in numerous absentions, the delegation of Brazil withdrew its proposition.

"The Belgian proposition (substitution of sequestration for confiscation), after having received a majority in favor of its consideration, was unable, in the discussion of its articles, to obtain what could be deemed a sufficient vote in its favor, and the royal delegation asked that it be withdrawn from consideration.

"Before the diversity of opinion thus expressed and the hope of concentrating the votes on a single formula, the president of the commission proposed to make them recomendation that in future, at the beginning of hostilities, the powers declare of their own accord if, and in what conditions, they have decided to renounce the right of capture.

"But, here again, objections were raised from various quarters and the compromise *vœu* was withdrawn.

"The commission was thus obliged to express its opinion, in the final result, upon the twofold *vœu* proposed by the French delegation (suppression of individual shares of prize money, participation of the state in the losses suffered by capture). This *vœu*, notwithstanding an amendment of Austria-Hungary, likewise resulted only in an indecisive vote and in numerous abstentions.

"Such is the summary of this long discussion of one of the most important questions of the programme of the commission. I have endeavored to make it true, without, however, imposing upon your time. I wish I could have better expressed the profound impression left in each one of us by the beautiful addresses which it was our privilege to hear. If the maintenance of the present state of affairs seemed to result necessarily fromthis discussion, it is permitted to hope, with the eminent First Delegate of Belgium, his Excellency M. Beernaert, that a future agreement is not impossible."

(La Deuxième Conférence Internationale de la Paix, Actes et Documents, Vol. I, pp. 248—249.)

When the vote was taken, it was found that of thirty three States voting twenty-one States voted for the inviolability, eleven against, and one abstained from voting.

Those voting for were Germany (under reservations), United States, Austria, Belgium, Brazil, Bulgaria, China, Cuba, Denmark, Ecuador, Greece, Haiti, Italy, Norway, Netherlands, Persia, Roumania, Siam, Sweden, Switzerland, and Turkey.

Those voting against were Colombia, Spain, France, Great-Britain, Japan, Mexico, Montenegro, Panama, Portugal, Russia, and Salvador.

Chile abstained from voting. (Deuxième Conférence Internationale de la Paix, Tome III, p. 834.)

M. de Martens remarked that the vote was hardly decisive, considering the maritime predominance of some of the powers voting in the negative.

As Professor Wilson says, "Thus it may be concluded that the powers of the world were not prepared in 1907 to accept the principle of inviolability of private property at sea." (U. S. Naval War College-International Law, Topics and Discussions, 1913, p. 127.)

I have endeavored to get an expression of American opinion at the present time on this subject, and have therefore asked some of the leading professors of international law in the United States to state their ideas. The letters here submitted were given in answer to the following questions which were sent uniformly to each writer:

1. What is your opinion concerning the future development of the principle of the immunity of private unoffending property of the enemy upon the high seas?

2. How is this prineiple affected by the stipulation in Article 6 of the Minimum-Programme of the Central Organization for a Durable Peace that "the States shall bind themselves to take concerted action, diplomatic, economic or military, in case any State should resort to military measures instead of submitting the dispute to judicial decision or to the mediation of the Council of Investigation and Conciliation;"

and by the third plank in the platform of the League to Enforce Peace: "The signatory powers shall jointly use forthwith both their economic and military forces against any one of their number that goes to war, or commits acts of hostility, against another of the signatories before any question arising shall be submitted as provided in the foregoing."

Would "concerted action" carry with it the right to waive the principle of the immunity of private property if a State refused to submit its controversy to judicial decision?

John Bassett Moore, formerly Assistant Secretary of State and Counselor of Department of State, writes:

As to point 8 of the "minimum-program," I do not see how the right of capture can be abolished, so long as war is carried on. It is superfluous to refer to the military importance of the use of the seas for military purposes. So long as the seas are used for the transportation of arms and ammunition to belligerents, it will be necessary for them to possess and to exercise the right of capture. The same thing is true of enemy ships, either put or readily capable of being put to the uses of war. Personnally, I have never quite understood the attitude of those who, while opposing war, advocate measures which practically mean that there must be no interference with the doing, even by neutrals, of what contributes to the killing of the human combatants.

As to the immunity of "private unoffending property of the enemy upon the high seas," such property is already in a certain measure protected by the rule that free ships make free goods. I do not at first blush see the connection between this principle and point 6 of the "minimum-program," or with the third plank in the platform of the "League to Enforce Peace." While this plank apparently is intended to make of every war a world war, the question of the treatment of private property is one that involves the limitations of warlike action rather than the causes for which war shall be made.

J. B. MOORE.

Amos S. Hershey, Professor of Political Science and International Law in Indiana University, Bloomington, Indiana, writes:

In common with most pacifists and idealists, I was, prior to this war, a believer in the adoption of the principle of immunity from capture of unoffending private property at sea.

I now see that I was mistaken. In any serious conflict between land and sea power, the latter must needs exercise the right of capture in order to bring sufficient pressure to bear upon its enemy. To deprive sea power of this weapon would be depriving it of its right arm. In case of a conflict with a state like Germany it would be absolutely indispensable.

Like England and Japan, the United States is also destined to become a Great Sea Power. In a world where force or resort to arms still at times prevails, the right of private capture at sea must be preserved. Even the proposed League of Peace might find it necessary to exercise it.

Consequently, I am decidedly of the opinion that effective "concerted action" must include the right to capture private unoffending property of the enemy at sea.

AMOS S. HERSHEY.

Harry Pratt Judson, President and Professor of International Law in the University of Chicago, Chicago, Illinois, writes:

It seems to me likely that private property of the enemy on the high seas ultimately will not be subject to capture, unless (1) it is contraband, or unless (2) it is bound to a blockaded port. On the other hand, this will not in my judgment be so much an advance in international law as was thought to be the case at the time of the Congress of Paris in 1856. "Contraband" is a very flexible term, constantly changing, and apparently has tended to become more and more inclusive. That being the case, the adoption of the principle of the immunity of private enemy property at sea from capture after all will put the difficulty only one step farther back, namely, on the definition of contraband, and perhaps also on the definition of blockade.

I could hardly undertake to interpret the principles of your organization, but on the face of it have no doubt that such a league

as that to which you refer could interpret for itself rights as to private property.

HARRY PRATT JUDSON.

Charles Cheney Hyde, Professor of International Law in Northwestern University, Evanston, Illinois, writes:

I believe that the principle of the immunity of private enemy property from capture or attack on the high seas, other than contraband of war, should be generally accepted. The trend of events of the present War very much fortify this opinion. Nevertheless, in order to make the principle practically useful in its operation, there is required general agreement of the most definite and far-reaching kind as to what is "unoffending" property, or conversely, what is contraband of war. It must be obvious that the value of acceptance of the general principle depends upon the clear understanding as to the limitation of its operations. The present tendency of certain belligerent maritime powers to treat as contraband of war articles of any kind if destined for the enemy, irrespective of their ultimate use and irrespective of the character of those articles, serves to eliminate the very existence of so-called "unoffending" enemy property.

Without expressing any opinion as to the desirability of article 6 of your minimum program, permit me to say that the work of your organization with respect to the question mentioned, might be aided in its usefulness by considering the necessity of international agreement that shall mark out with clearness and certainty the basis for ascertaining what is "unoffending" property.

CHARLES CHENEY HYDE.

Lindsay Rogers, Professor of Political Science in the University of Virginia, Charlottesville, Virginia, writes:

In the first place, I of course think that it is highly desirable for there to be agreement as to the immunity of private property, but when I reply to your request for my opinion as to future development I am simply stating the desirable and not the probable.

You say in your letter that the establishment of this principle would not of itself change the law of blockade or of contraband, but I doubt whether it is true now, as Mr. Choate said in his address

before the second Hague Conference that no instance can be found in modern wars of a war having been shortened by the exercise of this power; and I fancy, therefore, that any effort to arrive at an agreement concerning immunity would have to take into consideration Germany's experience under the English Orders in Council, and therefore if the principle were adopted England's acquiescence could not be secured without substantial modifications in the law of blockade and of contraband.

You are doubtless familiar with Mr. Balfour's remarkable *Saturday Evening Post* interview, reprinted, I believe in *Current History*. There, I recall, he makes the point that there could be no assurance that a nation which had sufficient sea power (here he referred especially to Germany) would respect the guarantee of the principle of immunity; so in answer to your second question I would say that it seems to me that not only must the States bind themselves to take concerted action in case of non-resort to the international court, but that also in order to secure the adoption of the principle of immunity they must bind themselves to take action in case of its violation.

Now the international assertion of the right of capture if a State refuse to submit its controversy to the Court, to which I referred in my other letter, comes, I think, under the proviso that the "States shall bind themselves to take concerted action, diplomatic, economic, or military." This right of capture, it seems to me, would not necessarily mean confiscation, but would simply mean sequestration as is the case now with hostile embargo and pacific blockade, and what I suggested would simply mean that under the programme of the Central Organization there would be concerted action in respect to pacific blockade and the right of capture. If war broke out the principle of the immunity of private property could then be disregarded and the war could date back to the date of the declaration of hostile embargo, as seems to be the case now.

To sum up, then, I think it important to realize in connection with your discussion of the question, that while, generally speaking, England's interest may lie in the direction of immunity, still the experiences of this war have been such, first, that the laws with reference to commercial blockade and contraband must be materially revised, and, secondly, that in order to secure England's consent there must be some international guarantee of the principle. Germany's submarine campaign would prevent the Allied Nations or the present neutrals, I think, from simply agreeing to the principle without this guarantee.

LINDSAY ROGERS.

Jesse S. Reeves, Professor of Political Science in the University of Michigan, Ann Arbor, Michigan, writes:

I am more or less acquainted with the Minimum-Program of the Central Organization for a Durable Peace. I certainly agree with each one of the nine propositions set forth in it, with the exception of the sixth and eighth. I feel with reference to these as I do with reference to the program of the League to Enforce Peace. I think the world has to some extent reacted from the idea that international agreements have greater validity than that public opinion, which would be supported, not only by the world, but by several powerful states. All states might bind themselves to take certain concerted action, yet, as we have seen with reference to the neutralization of Belgium, if a group of states considered itself strong enough to dominate a situation and felt that it was to its interest to do so, the treaty would be another "scrap of paper." This is a pessimistic attitude perhaps; but until there is a real common judgment among states which negatives their territorial or other ambitions, I do not believe any such international agreement would work. This war has shown that there is a tremendous gulf between states because of their failure to have a common conception of international life.

Specifically as to your first question. The conflict of the principle of the immunity of private unoffending property of the enemy upon the high seas is with the conception of contraband. You suggest this by the use of the word "unoffending." What is "unoffending" property at the present time? The principle of blockade in the traditional sense having broken down completely, the doctrine of contraband has been so widened as to leave no property of hostile destination unoffending. Vattel would doubtless have considered oil of vitriol unoffending, that is, not susceptible of use in war. Sulphuric acid is properly absolute contraband because it is one of the most important ingredients of modern explosives. I do not look for much development of the principle of the immunity of private property at sea if contraband is to include—as it always has included and as it must include as long as wars continue to exist—anything susceptible of use in war.

Answering your second question, it would seem to me that, notwithstanding any recognition of the immunity of private property at sea during war, economic pressure would result in waiving the principle or, as in the present war, extending to the maximum the contraband list. In an article printed in the *Political Science Review* for February, 1916, I endeavored to show some of the diffi-

culties in the way of arriving at a basis of complete international conciliation. Within certain topics international law has developed so that we may say that a *status quo* has been reached. There are other fields of international relationships where no such *status quo* is yet recognized, and here policies control. Again, there is a third field in which, while there is an acceptance of international law, it runs counter to well defined policies. What I think is not realized is that in international life there is yet no static condition such as we do have within the state, where municipal law, notwithstanding its changes and development, furnishes a static condition.

J. S. Reeves.

H. N. Brailsford expresses a view maintained by many Englishmen at the present time:

"Like most English progressives I used before the war to accept the doctrine of the Manchester school, that trade is a relationship between 'private merchants' which ought to be exempt from the operations of war. It followed that capture at sea was an archaic survival, ripe for abolition, and we thought with Cobden that blockades should be confined to the reduction of fortified bases already besieged by land. It is hard today, even for Englishmen who are habitually critical of any abuse of force, to think themselves back into these conceptions. The German professor said that there are no 'non-combatants.' To us it seems that there are no 'private merchants.' We have come to think of trade as a national activity, to be regulated and directed by the state. We have even nationalized the investment of capital abroad, to the extent of guaranteeing the profits of the bank which is going to 'penetrate' Italy. Of private trade we retain nothing but the private profit. It is clear to us now that this Manchester doctrine of the inviolability of trade in war was a deduction from individualistic premises which we long ago discarded. The same school held that trade should be free from all interference by the state. With that general assumption, the particular application also falls. On the broad grounds of humanity there is an overwhelming case for shielding the civilian from sudden death by torpedo or aerial bomb, and there is as strong a case for excepting food from the rigors of a blockade. But the experience of this war has sunk so deeply into the national mind, that I question gravely whether we shall ever consider the abolition of the embargo on trade, when laws of warfare are revised. Our imagination would refuse to picture the seas in wartime, over which enemy trade—barring contraband—went hither and thither freely

in enemy vessels or even in neutral vessels, in front of the silent guns of our fleet. We should see in that suggestion merely a proposal to emasculate sea-power."

(The New Republic, Oct. 28, 1916, p. 324.)

In discussing sea-power as a factor in a League of Nations, Mr. Brailsford says:

"Sea-power, available to the fullest limit consistent with humanity, will be an indispensable arm for any league of nations. But there must be no risk that it will be used at the unchecked discretion of any single Power. If it is reserved for an annihilating use in war, it certainly must not be abused in peace to hamper the legitimate colonial expansion of other peoples, or to back a monopoly in trade. If we mean to maintain—as I do not doubt we do—our relative supremacy at sea, we must clear our colonial and economic policy of any objections on these scores. But also there must be no loophole left which would permit the use of the tremendous engine of the embargo for the self-regarding purposes of a single-Power. The logic of the modern evolution of war and internationalism leads straight to this conclusion—that the progressives who used to dream, with Franklin and Paine and Cobden, of disarming and limiting sea-power, should strive instead to harness it to the chariot of international order. The embargo, in that, should be retained as the inevitable defense of civilization, but on the understanding that it may be nsed only in wars sanctioned by the League, and only by the express order of the League. Theoretically there ought to be no other wars, and no loyal member of the League, if it can be created, will contemplate other wars. Non ethe less they may come. Both parties to a dispute may refuse the processes of conciliation, or reject its awards. In that case both are offenders and technically aggressors, and the League as such is disinterested in their private, egoistic strife. Against both of them, in the interests of neutrals—for in this case neutrality is a duty—civilization ought to maintain the stiffest reading of neutral rights, regarding their struggle as a nuisance and a negation of order. It would recognize no blockades or war zones or embargoes imposed by these broilers in such a war, and would use its forces, if need be, to maintain 'the freedom of the seas.'

"If this conception can be developed, it would lead us to a revision of the law of war at sea in three chapters, of which the first would impose rules of humanity applicable in all wars, the second prescribe rules to secure the immunity of innocent trade in private

and unauthorized wars, and the third define the conditions for the enforcement of a formal embargo by the whole league of law-abiding states. By this distinction (it is as yet only an individual suggestion) if the League can be founded, the traditional American principle of the inviolability of neutral trade in war may be reconciled with the British objection to the emasculation of sea-power."
(Ibid., p. 325.)

The above discussion shows that the immunity of private property at sea is closely related to other matters pertaining to maritime warfare. The present war has made evident the necessity for a general reorganization of the laws of maritime warfare. As Franz von Liszt, of the German Imperial Reichstag, says:

"But the rules of war at sea must be entirely reconstructed; for reasons, which do not need to be set forth, practically no part of them remain except the Declaration of Paris of 1856, and even this has practically collapsed, at least as far as its most important aspects are concerned."
(University of Pennsylvania Law Review & American Law Register, June, 1916, p. 771.)

This reorganization involves a detailed consideration of contraband of war, blockade in time of war, the conversion of merchant ships into war-ships, the status of enemy merchant vessels at the outbreak of hostilities, the status of armed merchant vessels, etc. T. Baty, of the Inner Temple, Barrister-at-Law, says:

"One is driven to the conclusion that the real remedy for the present difficulties is the abandonment of the sanctity with which the Declaration of Paris has somehow become invested. So long as the enemy's goods can traverse the seas in safety, provided they are not contraband, so long will the temptation to enlarge the category of contraband be irrestistible.

"And it must be remembered that since the Declaration of London, the neutral carrier of contraband, however innocent the cargo

seems, loses his ship. The neutral carrier of enemy goods was not only safe, but received his full freight.

"The instinct of the United States, in declining to accede to the Paris Agreement, was based on a sound intuition. The humanitarian provisions of that instrument came before their time. It could lead to no good purpose to enact a complaisance for which the world was not ready. Belligerents have broken out of its meshes by revolutionizing the conception of contraband, and the last state of the neutral, if their ideas are adopted, will be worse than the first."

(University of Pennsylvania Law Review and American Law Register, February, 1916, p. 340.)

The Declaration of London, drafted by representatives of Germany, the United States, Austria-Hungary, Spain, France, Great Britain, Italy, Japan, the Netherlands and Russia, and signed on February 26, 1909, at London, drew up a list of contraband and non-contraband goods. It defined three classes: 1. Absolute contraband, articles exclusively used for war; 2. Conditional contraband, articles susceptible of use in war as well as for purposes of peace; 3, Articles which are not susceptible of use in war, and may not be declared contraband of war. Either of the first two lists may be added to by declaration of the belligerents.

The following articles may, without notice, (1) be treated as contraband, under the name of absolute contraband:

(1) Arms of all kinds, including arms for sporting purposes, and their distinctive component parts.

(2) Projectiles, charges, and cartridges of all kinds and their distinctive component parts.

(3) Powder and explosives specially prepared for use in war.

(4) Gun mountings, limber-boxes, limbers, military wagons, field forges, and their distinctive component parts.

(5) Clothing and equipment of a distinctively military character.

(6) All kinds of harness of a distinctively military character.

(7) Saddle, draught, and pack animals suitable for use in war.

(8) Articles of camp equipment, and their distinctive component parts.

(9) Armor-plates.

(10) Warships, including boats, and their distinctive component parts of such a nature that they can only be used on a vessel of war.

(11) Implements and apparatus designed exclusively for the manufacture of munitions of war, for the manufacture or repair of arms, or war material for use on land or sea.

(Declaration of London, Article 22.)

The following articles, susceptible of use in war as well as for purposes of peace, may, without notice, (2) be treated as contraband of war, under the name of conditional contraband:

(1) Foodstuffs.

(2) Forage and grain, suitable for feeding animals.

(3) Clothing, fabrics for clothing, and boots and shoes, suitable for use in war.

(4) Gold and silver in coin or bullion; paper money.

(5) Vehicles of all kinds available for use in war and their component parts.

(6) Vessels, craft and boats of all kinds; floating docks, parts of docks, and their component parts.

(7) Railway material, both fixed and rolling stock, and material for telegraphs, wireless telegraphs and telephones.

(8) Balloons and flying-machines and their distinctive component parts, together with accessories and articles recognizable as intended for use in connection with balloons and flying-machines.

(9) Fuel; lubricants.

(10) Powder and explosives not specially prepared for use in war.

(11) Barbed wire and implements for fixing and cutting the same.

(12) Horseshoes and shoeing materials.

(13) Harness and saddlery.

(14) Field-glasses, telescopes, chronometers, and all kinds of nautical instruments.

(Ibid., Article 24.)

The following may not be declared contraband of war:

(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.

(2) Oil-seeds and nuts; copra.

(3) Rubber, resins, gums, and lacs; hops.

(4) Rawhides and horns, bones and ivory.

(5) Natural and artificial manures, including nitrates and phosphates, for agricultural purposes.

(6) Metallic ores.

(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates and tiles.

(8) Chinaware and glass.

(9) Paper and paper-making materials.

(10) Soap, paint, and colors, including articles exclusively used in their manufacture; varnish.

(11) Bleaching-powder, soda-ash, caustic soda. salt-cake, ammonia, sulphate of ammonia, and sulphate of copper.

(12) Agricultural, mining, textile, and printing machinery.

(13) Precious and semiprecious stones, pearls, mother-of-pearl, and coral.

(14) Clocks and watches, other than chronometers.

(15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs, and bristles.

(17) Articles of household furniture and decoration; office furniture und requisites.

(Ibid., Article 28.)

The Declaration of London did not become law, and there is therefore no agreement of the nations as to the articles to be considered contraband. It is the practice of belligerents, however, to declare the articles which they consider as absolute and conditional contraband. On October 29, 1914, the British Government issued an Order in Council which adopted the provisions of the Declaration of London with "the exclusion of the list of contraband and non-contraband" and modification of the articles relating to destination and the onus of the proof as to innocent destination. This Order in Council also authorized the withdrawal of Article 35 of the Declaration of London, which stated that "conditional contraband is not liable to capture, except when on board a vessel bound for

territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and when it is not to be discharged at an intervening neutral port." On July 7, 1916, the British Government issued another Order in Council withdrawing the Order in Council of October 29, 1914, and also subsequent Orders in Council amending this. The British explanation of July 7, 1916, as to the grounds for withdrawal, stated that the Orders adopting the provisions were issued, not because the Declaration in itself possessed "for them the force of law, but because it seemed to present in its main lines a statement of the rights and the duties of belligerents based on the experience of previous naval wars." Later the same explanation states that as the Declaration of London, drawn in 1909, as modified by various Orders in Council, did "not stand the strain imposed by the test of rapidly changing conditions and tendencies which could not have been foreseen," the Allies, in order that their purpose might not be exposed to misconstruction, "have therefore come to the conclusion that they must confine themselves simply to applying the historic and admitted rules of the law of nations."

Shortly after the outbreak of the present war, the United States, it is understood, sounded the belligerents as to their willingness to promulgate the Declaration of London during the existence of the war, and it is understood that Germany and Austria-Hungary agreed to promulgate it and to be bound by its provisions, upon condition of reciprocity. Great Britain, France and Russia expressed their willingness to pro-

mulgate the Declaration with the modification, as above noted, concerning contraband. This could only be taken as a conditional offer, in view of Article 65, requiring the Declaration to be accepted as a whole. After some negotiations, the United States withdrew its suggestion, and belligerents and neutrals are alike thrown back on international law as it existed before the Declaration.

British Statement of the Measures Adopted to Intercept the Sea-borne Commerce of Germany.

1. The object of this memorandum is to give an account of the manner in which the sea power of the British Empire has been used during the present war for the purpose of intercepting Germany's imports and exports.

I. *Belligerent Rights at Sea.*

2. The means by which a belligerent who possesses a fleet has, up to the time of the present war, interfered with the commerce of his enemy are three in number:

(*a*) The capture of contraband of war on neutral ships.
(*b*) The capture of enemy property at sea.
(*c*) A blockade by which all access to the coast of the enemy is cut off.

3. The second of these powers has been cut down since the Napoleonic wars by the Declaration of Paris of 1856, under which enemy goods on a neutral ship, with the exception of contraband of war, were exempted from capture. Enemy goods which had been loaded on British or Allied ships before the present war were seized in large quantities immediately after its outbreak; but for obvious reasons such shipments ceased, for all practical purposes, after the 4th August, 1914, and this particular method of injuring the enemy may therefore, for the moment, be disregarded.

No blockade of Germany was declared until March, 1915, and therefore up to that date we had to rely exclusively on the right to capture contraband.

II. *Contraband.*

4. By the established classification goods are divided into three classes:

(a) Goods primarily used for warlike purposes.
(*b*) Goods which may be equally used for either warlike or peaceful purposes.
(*c*) Goods which are exclusively used for peaceful purposes.

5. Under the law of contraband, goods in the first class may be seized if they can be proved to be going to the enemy country; goods in the second class may be seized if they can be proved to be going to the enemy government or its armed forces; goods in the third class must be allowed to pass free. As to the articles which fall within any particular one of these classes, there has been no general agreement in the past, and the attempts of belligerents to enlarge the first class at the expense of the second, and the second at the expense of the third, have led to considerable friction with neutrals.

6. Under the rules of prize law, as laid down and administered by Lord Stowell, goods were not regarded as destined for an enemy country unles they were to be discharged in a port in that country; but the American prize courts in the Civil War found themselves compelled by the then existing conditions of commerce to apply and develop the doctrine of continuous voyage, under which goods which could be proved to be ultimately intended for an enemy country were not exempted from seizure on the ground that they were first to be discharged in an intervening neutral port. This doctrine, although hotly contested by many publicists, had never been challenged by the British Government, and was more or less recognized as having become part of international law.

7. When the present war broke out it was thought convenient, in order, among other things, to secure uniformity of procedure among all the Allied forces, to declare the principles of international law which the Allied Governments regarded as applicable to contraband and other matters. Accordingly, by the Orders in Council of the 20th August and the 22nd October, 1914, and the corresponding French decrees, the rules set forth in the Declaration of London were adopted by the French and British Governments with certain modifications. As to contraband, the lists of contraband and free goods in the Declaration were rejected, and the doctrine of continuous voyage was applied not only to absolute contraband, as the Declaration already provided, but also to conditional contraband, if such goods were consigned to order, or if the papers did not show the consignee of the goods, or if they showed a consignee in enemy territory.

8. The situation as regards German trade was as follows: Direct trade to German ports (save across the Baltic) had almost entirely ceased, and practically no ships were met with bound to German ports. The supplies that Germany desired to import from overseas were directed

to neutral ports in Scandinavia, Holland, or (at first) Italy, and every effort was made to disguise their real destination. The power which we had to deal with this situation in the circumstances then existing was:

(*a*) We had the right to seize articles of absolute contraband if it could be proved that they were destined for the enemy country, although they were to be discharged in a neutral port.

(*b*) We had the right to seize articles of conditional contraband if it could be proved that they were destined for the enemy government or its armed forces, in the cases specified above although they were to be discharged in a neutral port.

9. On the other hand, there was no power to seize articles of conditional contraband if they could not be shown to be destined for the enemy government or its armed forces, or non-contraband articles, even if they were on their way to a port in Germany, and there was no power to stop German exports.

10. That was the situation until the actions of the German Government led to the adoption of more extended powers of intercepting German commerce in March, 1915. The Allied Governments then decided to stop all goods which could be proved to be going to, or coming from, Germany. The state of things produced is in effect a blockade, adapted to the condition of modern war and commerce, the only difference in operation being that the goods seized are not necessarily confiscated. In these circumstances it will be convenient, in considering the treatment of German imports and exports, to omit any further reference to the nature of the commodities in question as, once their destination or origin is established, the power to stop them is complete. Our contraband rights, however, remain unaffected, though they, too, depend on the ability to prove enemy destination.

(British Parliamentary Papers, Miscellaneous No. 2 (1916). (Cd. 8145.)

As to the relation between the inviolability of private property at sea and exemptions from capture, Professor Wilson says:

"There would.... arise, in case of the adoption of the principle of inviolability, a doctrine in regard to exception of certain classes of property from the inviolability. On the other hand, the same result is gradually being brought about by the agreement not to interfere with or not to capture certain classes of vessels or pro-

perty in time of war on the sea. Perhaps the gradual enlargement on the list of exemptions may be more easy to obtain and more in accord with rational procedure than a sweeping prohibition which would be accompanied with a large list of exceptions of classes of property which would be liable to capture. The United States can consistently indorse either method of harmonizing maritime warfare with the principles of humanity, for one method of procedure may reach the goal sought as quickly as the other, and the gradual development of a list of property free from capture may be practicable with the minimum of friction and difficulty.

"The United States may with propriety abandon the contention for the general exemption of enemy private property at sea and seek agreement upon a certain list of exemptions which meet the approval of the states of the world and which may from time to time be expended as the sentiment for exemption becomes more general."

(U. S. Naval War College-International Law, Topics and Discussions, 1913, p. 131.)

The policy adopted by the Allied Governments in March, 1915, "to stop all goods which could be proved to be going to, or coming from, Germany," as stated in Article 10 of the Britsch Statement of the Measures Adopted to Intercept the Sea-borne Commerce of Germany, (Supplement to the American Journal of International Law, April, 1916, p. 89), so extends the conception of blockade as to defeat the rule granting immunity to non-contraband enemy goods. The statement by Stanhope W. Sprigg, (The British Blockade, reprinted from Pearson's Magazine, p. 1), emphasizes this beyond a doubt: "The British Naval blockade of Germany does not, as a good many people appear to imagine, merely obtain in the North Sea and the English Channel. It extends from Iceland to the Mediterranean; from the far north to the equator — or even further south. It is, in fact, not an exaggeration to say

that the blockade exists, in a greater or smaller degree, in all the seas of the world. There are ships patrolling the frozen seas of the Arctic regions, others under the tropical sun of the torrid zone."

The fundamental principle governing blockades is that a blockade, in order to be binding, must be effective. This rule was formulated in the Declaration of Paris in 1856: "Blockades in order to be binding must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of an enemy." No attempt is made to explain what is necessary to constitute "a force sufficient really to prevent access to the coast of an enemy." The Declaration of London provides in Article 3 of the portion of the Declaration relating to blockades, that "the question whether a blockade is effective is a question of fact." The following instructions were issued by the American Government in the Spanish War to its naval commanders: "A blockade to be binding and effective must be maintained by a force sufficient to render ingress to or egress from the port dangerous." (Proclamations and Decrees during the War with Spain, 85.) Woolsey defines a sufficient force as such as "will involve a vessel attempting to pass the line of blockade in considerable danger of being taken." (Page 343). Oppenheim states that "real danger of capture suffices, whether the danger is caused by cruising or anchored men of war." (II, 162.)

British writers, in attempting to prove the legality of the blockade of Germany, cite the precedents established by the United States during the Civil War. In

referring to Clause 5 of the Order in Council of August 20, 1914, by which England provided that conditional contraband goods, if shown to have the destination set out in Article 33, are liable to capture "to whatever port the vessel is bound and at whatever port the cargo is to be discharged." Mr. W. E. Hume-Williams says:

> "This latter clause is not without interest for America and is in itself a compliment-possibly involuntary and certainly tardy — to American lawyers and indeed to the American people, for it contains a simple adoption of the principle laid down by the Supreme Court of the United States in the case of the *Bermuda* in 1865, a principle which has been repudiated in Europe until the actualities of the present war showed its wisdom and its necessity. 'The interposition,' said Chief Justice Chase in the Supreme Court, 'of a neutral port between neutral departure and belligerent destination, has always been a favourite resort of contraband carriers and blockade runners. But it never avails them when the ultimate destination is ascertained. A transportation from one point to another remains continuous so long as intent remains unchanged, no matter what stoppages or transshipments intervene.' Similarly in the *Springbok*, decided in 1886, the Supreme Court of the United States went straight to the root of the matter when it determined that: 'we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination'.
>
> "In the *Peterhof*, where the goods were consigned to a Mexican port from which there was inland communication with Confederate territory, the American Court decided, in 1866, that contraband goods are liable to confiscation if there is ground for the belief that they are to be transported across neutral territory.
>
> "Those decisions stand out as monuments of common sense and remain not only true but essentially applicable to modern conditions."
>
> (International Law and the Blockade, W. E. Hume-Williams, KC. M.P. London: Sir Joseph Causton & Sons, Limited, p. 4.)

Speaking on the subject of "Continous Voyage," Simeon E. Baldwin says:

"The Order in Council issued by Great Britain on March 15, 1915, presses the doctrine of a continuous voyage so far that our Government (in its dispatch to our Ambassador at London, of March 30, 1915) has characterized its terms as 'a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost inqualified denial of the sovereign rights of the nations now at peace.' We therefore intimated that some modus vivendi should be arranged, conformably to what we preferred to regard as the spirit of the Order, whereby voyages by American merchantmen to neutral ports would not be interfered with, when it is known that they do not carry goods which are contraband of war, or goods destined to or proceeding from ports within the belligerent territory affected. Something of this nature has been in fact since achieved, in respect to shipments in the course of trade with Holland, through the interposition of the 'Netherlands Oversea Trust' to guaranty the bona fides of the voyage; and the proceedings in the English prize courts have been regulated with a professed desire to avoid unnecessary interference with American shipping. Delays, of course, have occurred, and are likely in these and all other prize causes of importance to be prolonged by appeals to the Privy Council; but any such demand as that of the Chicago packers, in the matter of the meats seizures, that our Government insist at this time on a diplomatic rather than a judicial settlement of cases in admiralty, is opposed to our whole policy from the beginning of our national history. By that we have always, in dealing with countries having similar institutions to our own and courts which have won general confidence as real tribunals for the administration of justice, been ready to wait until those courts have spoken their last word, before our Executive Department finds fault with their Government for its course of action.

"One thing is clear. The adoption ad referendum of the Declaration of London by substantially all the maritime Powers, and the prize case decisisons thus far rendered in the present wars, as well as the general course of diplomatic correspondence, have given new strength to the doctrine of the continuous voyage as the American courts applied it to the events of the Civil War. It has now, in principle, the explicit sanction of the greatest naval Powers of Europe, by virtue of their incorporation of it in their Prize Codes or instructions, as revised under circumstances calling the closest attention to the doctrine in all its bearings. (See the German Imperial *Prisenordnung*, as revised in 1915, Art. 39.) It has recovered from the shock of the early assaults upon it of many European and

some American jurists, and is now all the stronger for them. Where such authorities as Francis Wharton, writing in a semi-official character in his *International Law Digest*, and the members of the maritime prize commission of the *Institut de Droit International*, (See Moore, Int. Law Digest, VIII, 731), and the *Institut* itself, (in 1882, though it came to a different conclusion in 1896), attack a doctrine vigorously, and after thirty years it is plain that they have failed to convince the world, it is no bad proof that they were wrong and the world is right."

(American Journal of International Law, October, 1915, pp. 799, 800, 801.)

James W. Garner points out in "Some Questions of International Law in the European War," (American Journal of International Law, October, 1915, p. 851), that

"the Declaration of London sanctions the rule of continuous voyage in respect to the carriage of absolute contraband and also to the carriage of conditional contraband in case the enemy has no seabord (Art. 36); but it makes no such concession in respect to blockade. On the contrary, it declares that 'whatever may be the ulterior destination of a vessel or of her cargo, she cannot be captured for breach of blockade, if, at the moment, she is on her way to a non-blockaded port' (Art. 19).

"This provision definitely condemns the American practice during the Civil War and sanctions the rule which the English have heretofore maintained and the adoption of which the British delegates to the London Naval Conference in 1909 insisted upon. In the present war, Great Britain, finding herself in a somewhat analagous position to that of the United States during the Civil War in respect to the difficulties encountered in enforcing her blockade, has adopted the means which the American Government applied but which the publicists of England, if not the Government itself, unaminously condemned. If not consistently, yet effectually the British Government has therefore been able to answer the American protest with arguments drawn from American practice and judicial precedent."

Further Mr. Garner says:

"Regarding the legality of the ,so-called' blockade of Germany,

there is, of course, substantial ground for a difference of opinion. Unquestionably, it does not conform to the technical rules heretofore recognized as essential to a valid blockade. Before the days of torpedoes, mines, submarines and air craft the prevailing conception was that a blockaded port must be closed by a cordon of ships stationed in the immediate offing or as near as was compatible with safety from the enemy's defenses (which in those days consisted of guns), to make ingress and egress dangerous if not impossible. It can hardly be maintained, however, that since the introduction of the new agencies and methods of naval warfare referred to above the old requirement of blockade by a cruiser cordon is now essential. The American Government in its note of March 30th expressed a readiness to admit that the old form was no longer practicable in the face of an enemy possessing the means and opportunity to make an effective defense by the use of submarines, mines and air craft. The long range blockade must therefore be recognized as valid, and blockading craft must be permitted to remain so far out as to be beyond the range of torpedo boats or mines, which means that they may be so completely out of sight of the blockaded port as to render ingress and egress no longer dangerous. If this is not recognized as an effective blockade, blockade under modern conditions is now impossible."

(Ibid., pp. 846, 847.)

The principles relied upon in the present war, then, have been to extend the list of contraband articles and to enlarge the conception of blockade to any degree which, according to belligerents, military exigencies required.

Professor Wilson points out another element which must be considered in a discussion of the immunity of private property at sea, namely: the conversion of enemy private ships into ships of war:

"If, however, conversion of enemy private ships into ships of war is to be permitted on the high sea, it will be necessary for a belligerent to use great care in his conduct toward his opponent's private vessels. A private vessel of one belligerent which may be met on the high sea by the other belligerent may claim exemption on the ground that it is a private vessel, which may be the fact at

the time. Shortly afterwards the private vessel may be converted into a public war vessel. It is now not only liable to capture, but also liable to be destroyed or seized, and its personnel may be made prisoners of war. As there are as yet no rules regulating reconversion, such a vessel may after a time, perhaps when capture may be expected, undergo reconversion into a private vessel and be accordingly exempt as private property.

"To include vessels without exception in the exemption making private property at sea inviolable is to give an exemption after war is opened and vessels have sailed with a knowledge thereof, which is not given to vessels in a belligerent port at the outbreak of war or to vessels which have sailed without knowledge of the war bound for a belligerent port. Article V of the convention relative to the status of enemy merchant ships at the outbreak of hostilities provides that.

> The present convention does not affect merchant ships whose build shows that they are intended for conversion into war ships.

"At the present time few ships are of such construction that they may not, under some circumstances, be of use for war even if not originally constructed for that service. A pleasure yacht may become useful as a scouting vessel, an ordinary privately owned collier may easily be converted into a public collier, etc.

"It would seem necessary that if other innocent private property is granted exemption, it would be on the ground that the innocence can be determined from the nature of the property itself.

"Goods of the nature of contraband can be determined in most cases from inspection. Whether a vessel is to be converted from private to public can not be determined by inspection, for the physical character of the vessel may remain the same in private or in public control. The control is the main difference, and this may be transferred by radio-telegraph or even on a certain date by previous agreement, which date may not have arrived at the time when the vessel was met by the belligerent of the other flag." (U. S. Naval War College-International Law, Topics and Discussions, 1913, pp. 128, 129.)

Convention VII of the Second Hague Conference, Relating to the Conversion of Merchant Ships into War-Ships (The Hague Conventions and Declarations of 1899 and 1907, Scott, page 146) reserves the right to convert. No agreement was reached, however as,

to the place where such conversion shall take place. The preamble of this Convention states:

> Whereas it is desirable, in view of the incorporation in time of war of merchant ships in the fighting fleet, to define the conditions subject to which this operation may be effected;
>
> Whereas, however, the contracting Powers have been unable to come to an agreement on the question whether the conversion of a merchant ship into a war-ship may take place upon the high seas, it is understood that the question of the place where such conversion is effected remains outside the scope of this agreement and is in no way affected by the following rules;
>
> Being desirous of concluding a Convention to this effect, etc.

This Convention really amounts to the same thing as the first rule of the Declaration of Paris: Privateering is and remains abolished.

The following Powers have ratified the Convention: Austria-Hungary, Belgium, Brazil, Denmark, France, Germany, Great Britain, Guatemala, Haiti, Japan, Luxemburg, Mexico, Netherlands, Norway, Panama, Portugal, Roumania, Russia, Salvador, Siam, Spain, Sweden, Switzerland.

Liberia and Nicaragua have adhered to the Convention.

The following Powers signed the Convention but have not yet ratified: Argentine Republic, Bolivia, Bulgaria, Chile, Colombia, Cuba, Ecuador, Greece, Italy, Montenegro, Paraguay, Persia, Peru, Serbia, Turkey, Venezuela.

(The Hague Conventions and Declarations of 1899 and 1907, Scott, p. 149.)

The United States neither signed nor ratified the Convention.

Important also in this discussion is the practice with

regard to days of grace for merchant vessels of the enemy. On this subject, Professor Wilson says:

"A degree of consideration for merchant vessels of one belligerent within the ports of the other belligerent has often been shown since the seventeenth century. Such consideration was particularly common about the middle of the nineteenth century, though no clear principle could be said to be established. The practice of granting days of grace showed wide differences in the period granted, varying from six weeks to a few hours. At the Conference at The Hague in 1907 the delegates of the United States took the position that days of grace for departure of merchant vessels of one belligerent in the port of the other belligerent at the outbreak of war should be regarded as obligatory. The British delegation were opposed to making the grant of a period for departure obligatory, though supporting the idea that it would be desirable as a favor. The result of the consideration at The Hague in 1907 was the formulation of a convention less stringent in its provisions than recognized by the United States delegation as then legally binding under international practice.

"The objection brought forward against an obligatory period was that a fixed number of days would be undesirable, as the period should be determined in each case as it arose. This objection seemed sound, but in no way insurmountable. The Convention of 1907 relative to the Status of Enemy Merchant Vessels announces in the preamble that the states of the world are anxious in negotiating the convention' to insure the security of international commerce against the surprises of war' and to protect commercial operations' in process of being carried out before the outbreak of hostilities.' As commercial relations involve mutual exchange, the difficulty which many felt lest one state should gain an advantage over another at the outbreak of war would seem to be met by the insertion of a reciprocal obligation to grant days of grace accompanied by the proviso that one belligerent should be obliged to grant no longer period than that granted by his opponent. Such a plan is both reasonable and practicable.

"It is reasonable that one belligerent should not be under obligation to accord to his opponent more favorable treatment than that accorded to him hy his opponent. It is practicable because the belligerent granting a given period to his opponent may under the reciprocity principle shorten the period to that accorded by his opponent.

"Further to support this position may be adduced the practice

of the present war in Europe. The German declaration of war against France of August 3, 1914, contained a provision for reciprocity in regard to treatment of merchant vessels, which France immediately met. The British Orders in Council of August 4, 1914, oontained a similar plan for German vessels, but this was not carried into effect rather because of misunderstanding of telegrams, than because of lack of willingness on the part of Great Britain and Germany. The principle of days of grace was adopted as regards Austria-Hungary when Great Britain was informed that Austria-Hungary would treat British ships in a manner' not less favorable' than that proposed by Great Britain for Austro-Hungarian vessels. France likewise accorded reciprocal treatment to Austro-Hungarian merchant vessels.

"It would seem proper that the United States should continue to support as reasonable and practicable a plan to which in actual test of war the great states have resorted, and that the principle of reciprocity in the grant of days of grace for innocent merchant vessels of one belligerent in the ports of the other at the outbreak of war should prevail."

(American Journal of International Law, January, 1916, pp. 112, 113.)

The first Italian Decree Relative to Enemy Merchant Vessels, of May 30, 1915, states:

Article 1. All enemy merchant ships lying in the ports and territorial waters of the kingdom and of its colonies at the outbreak of hostilities shall be sequestered by the local naval authorities.

Art. 2. Special technical commissions assisted by the naval authorities shall visit enemy merchant ships thus sequestered with the object of ascertaining which among them are so constructed or built, or contain such internal arrangements of fittings, as may justify the assumption that they are intended to be converted eventually into warships.

Art. 3. In all cases in which it shall be found that vessels were intended for conversion into warships, these vessels shall be captured and placed under the jurisdiction of the Prize Court for a decision as to their ultimate disposal.

Art. 4. The vessels which shall not be found to have been intended for conversion into warships shall remain under sequestration. They may be requisitioned by the Minister of Marine for the whole duration of the present war, in accordance with rules to be laid down in another decree.

Art. 5. Enemy goods found on board all merchant vessels referred to in Article I above mentioned shall be sequestered and restored after the war without an indemnity, or else requisitioned with an indemnity.

Perishable goods shall be sold on special conditions which shall be laid down by our Ministry of Marine.

Art. 6. Neutral goods found on board any merchant ship referred to under Article I shall be released subject to an option of requisitioning them with an indemnity which the Government of the King may exercise.

Art. 7. The decision as to the nationality of the goods referred to under the preceding Articles 5 and 6, and the consequent verdict as to the release or sequestration of these goods shall lie with the Prize Court.

Art. 8. The regulations laid down in Articles 5 and 6 of the XIth Hague Convention of the 18th October 1907, shall be applicable to the members of the crews on enemy merchant vessels referred to in the preceding Article 1.

Art. 9. The treatment laid down in the preceding articles shall not be extended to enemy merchant ships which shall carry out or attempt to carry out any acts of hostility whether direct or indirect.

Art. 10. The rules laid down in the preceding articles are also applicable to those enemy merchant ships which shall have left their last port before the declaration of war, and which are met at sea before they are aware of the commencement of hostilities.

Art. 11. The Minister of Marine is empowered to issue special rules for the publication of the present decree which comes into force to day.

We order that the present decree, furnished with the seal of state, be included in the official record of the laws and decrees of the Kingdom of Italy, requiring everyone concerned to observe it and cause it to be observed.

Given at Rome this 30th day of May, 1915.

(British Parliamentary Papers, Miscellaneous, No. 18 (1915).
(Cd. 8104.))

The ratifications, adhesions and signatures to the Hague Conventions, relating to the status of enemy merchant ships at the outbreak of hostillities (Convention VI Relating to the Status of Enemy Merchant

Ships at the Outbreak of Hostillities) coincide almost exactly with those of Convention VII. The United States neither signed nor has she ratified the Convention.

The discussion of the immunity of private property at sea involves also the question of armed merchant ships.

On the 26th March, 1913, Mr. Winston Churchill, the First Lord of the British Admirality, made an important statement in the House of Commons regarding the methods proposed by Great Britain for the protection of trade. As reported in the *Times* Mr. Churchill's speech was as follows:

> "I now turn to one aspect of trade protection which requires special reference. It was made clear at the Second Hague Conference and the London Conference that certain of the great Powers have reserved to themselves the right to convert merchant steamers into cruisers, not merely in national harbours but if necessary on the high seas. There is now good reason to believe that a considerable number of foreign merchant steamers may be rapidly converted into armed ships by the mounting of guns. The sea-borne trade of the world follows well-marked routes, upon nearly all of which the tonnage of the British mercantile marine largely predominates. Our food-carrying liners and vessels carrying raw material following these trade routes would, in certain contingencies, meet foreign vessels armed and equipped in the manner described. If the British ships had no armament they would be at the mercy of any foreign liners carrying one effective gun and a few rounds of ammunition. It would be obviously absurd to meet the contingency of considerable numbers of foreign armoured merchant cruisers on the high seas by building an equal number of cruisers. That would expose this country to an expenditure of money to meet a particular danger altogether disproportionate to the expense caused to any foreign Power in creating that danger. Hostile cruisers, wherever they are found, will be covered and met by British ships of war, but the proper reply to an armed merchantman is another merchantman armed in her own defence. This is the position to

which the Admiralty have felt it necessary to draw the attention of leading shipowners. We have felt justified in pointing out to them the danger to life and property which would be incurred if their vessels were totally incapable of offering any defence to an attack. The shipowners have responded to the Admiralty invitation with cordiality, and substantial progress has been made in the direction of meeting it as a defensive measure by preparing to equip a number of first-class British liners to repel the attack of an armed foreign merchant cruiser. Although these vessels have of course, a wholly different status from that of the regularly-commissioned merchant cruisers such as those we obtain under the Cunard agreement, the Admiralty have felt that the greater part of the cost of the necessary equipment should not fall upon the owners, and we have decided, therefore, to lend the necessary guns, to supply ammunition, and to provide for the training of members of the ship's company to form the guns' crews. The owners on their part are paying the cost of the necessary structural conversion, which is not great. The British mercantile marine will, of course, have the protection of the Royal Navy under all possible circumstances, but it is obviously impossible to guarantee individual vessels from attack when they are scattered on their voyages all over the world. No one can pretend to view these measures without regret or without hoping that the period of retrogression all over the world which has rendered them necessary may be succeeded by days of broader international confidence and agreement than those through which we are now passing.

On this subject, James Brown Scott says:

"The question has been much discussed whether merchant ships of the enemy carrying arms for defensive purposes are to be considered as losing their mercantile character by this fact and are to be denied the privileges accorded by international law to enemy merchant vessels. The question has also been discussed since the outbreak of the great war whether the Declaration of Paris of 1856 forbidding privateering should in spirit, if not in the letter, prevent enemy merchant vessels from carrying arms, even for defensive purposes. The question has also arisen and has been the subject of diplomatic negotiations, with resultant tension, whether neutrals can properly ship their goods upon such armed merchant vessels without properly subjecting them to the fate of the vessel carrying them; and, finally, whether neutral persons travelling upon such vessels are to be held as voluntarily subjecting themselves to the

risk incurred by such vessels and, by assuming the risk, depriving themselves of the claim to protection of their governments, or, indeed, whether their governments have the right under such circumstances to protect their subjects or citizens in the premises.

"It will clear the field of discussion, at least so far as the United States is concerned, to state that this government is not a party to the Declaration of Paris, that it is therefore not bound by its provisions, and that the United States is free to recognize the right to indulge in privateering should it desire to do so.

""In the next place, it should be said, at least according to the practice of the United States, that an American citizen can not renounce the right of the government to protect him in an appropriate case, of which the government is the judge, because a citizen of the United States as such does not represent the United States, and a renunciation of a right can only be made by an official agent of the government acting within the scope of his agency. A familiar illustration from municipal law will make this distinction clear; A person injured by a tort may, if he choose, waive the civil injury; but if the tort be at one and the same time a crime, the injured person can not waive this, because he is not the agent of the public, and the appropriate agent of the public must determine whether or not prosecution shall take place.

"With these two questions out of the way, the others may be taken up and considered.

"It may be admitted that it is difficult to determine whether a gun is carried for a defensive or for an offensive purpose, but the circumstances of the individual case may be appealed to, as the armament required for one purpose differs from that necessary for the other. The view has been expressed that the duty of a merchant ship is not to resist if attacked, and that by defending itself it loses the character of a merchant ship and becomes a privateer, in the sense that it carries on hostile operations without becoming a public vessel; and as privateering is forbidden by the Declaration of Paris, which binds the contracting parties, the vessel in question has no legitimate standing in international law. It is not a private vessel converted to a public purpose, commissioned by the government and manned by officers of the navy; and, on the other hand, it is not a merchant vessel plying its peaceful calling without taking part in hostilities. On September 19, 1914, the Department of State issued a circular which recognized that, 'A merchant vessel of belligerent nationality may carry an armament and ammunition for the sole purpose of defense without acquiring the character of a

ship of war,' and prescribed certain rules for determining the offensive or defensive character of the armament in each case."

(American Journal of International Law, January, 1916, pp. 113, 114, 115.)

CIRCULAR OF THE DEPARTMENT OF STATE OF THE UNITED STATES WITH REFERENCE TO THE STATUS OF ARMED MERCHANT VESSELS

Issued September 19, 1914

A

A merchant vessel of belligerent nationality may carry an armament and ammunition for the sole purpose of defense without acquiring the character of a ship of war.

B

The presence of an armament and ammunition on board a merchant vessel creates a presumption that the armament is for offensive purposes, but the owners or agents may overcome this presumption by evidence showing that the vessel carries armament solely for defense.

C

Evidence necessary to establish the fact that the armament is solely for defense and will not be used offensively, whether the armament be mounted or stowed below, must be presented in each case independently at an official investigation. The result of the investigation must show conclusively that the armament is not intended for, and will not be used in, offensive operations.

Indications that the armament will not be used offensively are:

1. That the caliber of the guns carried does not exceed six inches.

2. That the guns and small arms carried are few in number.

3. That no guns are mounted on the forward part of the vessel.

4. That the quantity of ammunition carried is small.

5. That the vessel is manned by its usual crew, and the officers are the same as those on board before war was declared.

6. That the vessel intends to and actually does clear for a port lying in its usual trade route, or a port indicating its purpose to continue in the same trade in which it was engaged before war was declared.

7. That the vessel takes on board fuel and supplies sufficient only to

carry it to its port of destination, or the same quantity substantially which it has been accustomed to take for a voyage before war was declared.

8. That the cargo of the vessel consists of articles of commerce unsuited for the use of a ship of war in operations against an enemy.

9. That the vessel carries passengers who are as a whole unfitted to enter the military or naval service of the belligerent whose flag the vessel flies, or of any of its allies, and particularly if the passenger list includes women and children.

10. That the speed of the ship is slow.

D

Port authorities, on the arrival in a port of the United States of an armed vessel of belligerent nationality, claiming to be a merchant vessel, should immediately investigate and report to Washington on the foregoing indications as to the intended use of the armament, in order that it may be determined whether the evidence is sufficient to remove the presumption that the vessel is, and should be treated as, a ship of war. Clearance will not be granted until authorized from Washington, and the master will be so informed upon arrival.

E

The conversion of a merchant vessel into a ship of war is a question of fact which is to be established by direct or circumstantial evidence of intention to use the vessel as a ship of war.

The introduction of war zones, mines and submarines in the present war complicates the discussion of the immunity of private property at sea. If a combatant can appropriate to his own warlike purposes an area of the free ocean, he need not concern himself with the law of contraband or of blockade. The establishment by proclamation of war zones on the open sea is a new measure of maritime warfare, and is apparently not dealt with in any of the treatises on international law. In the present war the war zone has been pressed into the service of both sides.

Great Britain was the first technically to do this. On the fourth of November, 1914, the British Government issued the following order, declaring the North Sea to be a war zone:

"Owing to the discovery of mines in the North Sea, the whole of that sea must be considered a military area. Within this area merchant shipping of all kinds, traders of all countries, fishing craft, and all other vessels will be exposed to the gravest dangers from mines which it has been necessary to lay and from war-ships searching vigilantly by night and day for suspicious craft.

"All merchant and fishing vessels of every description are hereby warned of the danger they encounter by entering this area except in strict accordance with Admiralty decisions. Every effort will be made to convey this warning to neutral countries and to vessels on the sea, but from the 5th of November onwards the Admiralty announces that all ships passing a line drawn from the northern point of the Hebrides through the Faroe Islands to Iceland do so at their own peril.

"Ships of all countries wishing to trade to and from Norway, the Baltic, Denmark, and Holland are advised to come, if inwards bound, by the English Channel and Straits of Dover. There they will be given sailing directions which will pass them safely, so far as Great Britain is concerned, up the east coast of England to Farne Island, whence safe route will, if possible, be given to Lindesnaes Lightship. From this point they should turn north or south, according to their destination keeping as near the coast as possible. The converse applies to vessels outward bound.

"By strict adherence to these routes the commerce of all countries will be able to reach its destination in safety, so far as Great Britain is concerned, but any straying, even for a few miles, from the course thus indicated may be followed by serious consequences."

(American Journal of International Law, July, 1915, p. 595.)

On February 4, 1915, the German Admiralty published the following decree:

"The waters around Great Britain, including the whole of the English Channel, are declared hereby to be included within the zone of war, and after the 18th inst. all enemy merchant vessels

encountered in these waters will be destroyed, even if it may not be possible always to save their crews and passengers.

"Within this war zone neutral vessels are exposed to danger, since, in view of the misuse of the neutral flags ordered by the Government of Great Britain on the 31st ult. and of the hazards of naval warfare, neutral vessels cannot always be prevented from suffering from the attacks intended for enemy ships.

"The route of navigation around the north of the Shetland Islands, in the eastern part of the North Sea, and in a strip thirty miles wide along the Dutch Coast are not open to the danger zone."

(American Journal of International Law, July, 1915, p. 594.)

Early in March it was announced that the zone had been extended to include the waters surrounding the Shetland, Islands. The German Government proclaimed this decree as a retaliatory measure against Great Britain, because of the decision of the British Government to treat all cargoes of foodstuffs destined to Germany as absolate contraband. The latter decision had been adopted by Great Britain because of the German decree of January 31, placing the grain and flour supply of the empire under government control.

Mr. Garner says in "Some Questions of International Law in the European War."

"While it is not unlawful for a belligerent to proclaim the existence of a war zone and to warn neutral vessels of the danger which they encounter in entering the waters thereof, there are manifestly limitations on the rights which he may exercise therein. The waters embraced within the zone remain, as before, a portion of the high seas, which neutral vessels have a lawful right to navigate, subject to no restictions except such as they are under everywhere on the open waters of the ocean. Within such zone a belligerent has no greater rights of visit, search, capture or destruction in respect to enemy or neutral vessels than he has outside this area. In short, belligerents have no right to appropriate any por-

tion of the high seas and close them to the navigation of neutral vessels."

(American Journal of International Law, July, 1915, p. 597.)

The proclamation of the war zone is closely concerned with that of sowing mines. "If contact mines," says T. Baty, "are legitimate engines of warfare, then there is an end to the freedom of the seas. For belligerents may strew them anywhere." (University of Pennsylvania Law Review and American Law Register, June. 1915, p. 707.)

"The use of mines in the sea is not a novelty of naval warfare introduced in the present war. They were successfully used in the American Civil War for the defense of harbors and the destruction of blockading ships, but the area affected was limited to territorial waters, within which nations have the right to protect themselves by all means at their disposal. It is when such deadly engines of destruction are placed beyond the territorial jurisdiction or are allowed to drift there that the right of neutral nations to the freedom of the seas is impinged upon. In protesting against the reported use by Peru in its war with Chile in 1880 of 'boats containing explosive materials' which were set adrift on the chance of their coming in contact with some of the blockading squadron, Mr. Evarts, Secretary of State, said that such means of warfare, so dangerous to neutrals, should 'be at once checked, not only for the benefit of Peru, but in the interest of a wise and chivalrous warfare, which should constantly afford to neutral Powers the highest possible consideration.' (Moore's International Law Digest, Vol. VI, p. 366). And the Chinese Government bitterly complained of the losses sustained by its subjects in both life and property owing to the distruction of Chinese vessels by floating mines, not only during but after the Russo-Japanese War, which may or may not have been placed within territorial waters. It remained for the leading maritime nations of the world in the present conflict, claiming to represent its highest civilization, openly to place mines in certain strategic parts of the high seas and formally to warn neutral vessels to keep out of them."

(American Journal of International Law, Editorial Comment, April, 1915, p. 462.

"The employment of mines as a mode of warfare was first resorted to on an extensive scale during the Russo-Japanese War, and the matter was first brought to the attention of the world by the Chinese delegation to the Second Hague Conference in 1907. (La Deuxième Conférence de la Paix, t. III, p. 663.)

"The acts of the First Hague Conference contained no provisions in respect to the employment of mines or torpedoes in war, and the Russo-Japanese War being the first in which they were used there were, of course, no precedents in regard to the employment of such agencies. But it is clear that their use under certain conditions was not condemned. The manual for the use of British officers in the field contained a provision which declared them to be legitimate weapons, and that those who used them were entitled to be treated as lawful combatants. (Smith and Sibley, p. 93.) Nevertheless, the laying of mines in the open sea where they endangered neutral shipping was severely criticised by many writers at the time. The English Admiral Horsey, in a letter published in the London *Times* (May 24, 1904), denounced the practice as 'inhuman and a breach of international law and practice.' Professor Holland (London *Times*, May 24, 1904) stated in a letter at the same time that 'it is certain that no international usage sanctions the employment of one belligerent against another of mines or other secret contrivances which would, without notice, render dangerous the navigation of the high seas.' Lawrence took a similar view." (War and Neutrality in the Far East, p. 10.).

(Mr. Garner in "Some Questions of International Law in the European War," American Journal of International Law, January 1915, pp. 88, 89.)

The Hague Convention of 1907, relative to the laying of automatic submarine contact mines was signed and ratified by the following belligerents engaged in the present war: Austria-Hungary, France, Germany, Great Britain and Japan. According to Article 11, the agreement was entered into for a period of seven years, dating from the sixtieth day after the date of the first deposit of ratifications, which took place on November 27, 1909. According to Article 7, it shall not apply unless all the belligerents are parties to it. It happens

that Russia, one of the belligerents in the present war, has not ratified the convention, and therefore it follows that it is not legally binding on any of them. The German Government, however, announced that it would act in accordance with the terms of the convention.

The convention forbids (1) the laying of unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them; (2) the laying of anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings; (3) the use of torpedoes which do not become harmless when they have missed their mark. It is also forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping. (This provision was not accepted by France and Germany.) When anchored automatic contact mines are employed, every possible precaution must be taken for the security of peaceful shipping. The belligerents undertake to do their utmost to render these mines harmless within a limited time, and, should they cease to be under surveillance, to notify the danger zones as soon as military exigencies permit, by a notice addressed to shipowners, which must also be communicated to the Governments through the diplomatic channel.

(Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, Articles 1, 2 and 3. "The Hague Conventions and Declarations of 1899 and 1907," Scott, pp. 151, 152.)

At the time of its signature, dissatisfaction was expressed with the convention. Sir Ernest Satow expressed the opinion on behalf of the British delegation:

"Having voted for the Mines Convention which the Conference has just accepted, the British delegation desires to declare that it cannot regard this arrangement as furnishing a final solution of the question, but only as marking a stage in international legislation on the subject. It does not consider that adequate account has been taken in the convention of the rights of neutrals to protection, or of humanitarian sentiments which cannot be neglected. The British delegation has done its best to bring the Conference to share its views, but its efforts in this direction have remained without result. The high seas, gentlemen, form a great international highway. If in the present state of international laws and customs belligerents are permitted to fight out their quarrels upon the high seas, it is none the less incumbent upon them to do nothing which might, long after their departure from a particular place, render this highway dangerous for neutrals who are equally entitled to use it. We declare without hesitation that the right of the neutral to security of navigation on the high seas ought to come before the transitory right of the belligerent to employ these seas as the scene of the operation of war.

"Nevertheless, the convention as adopted imposes upon the belligerent no restriction as to the placing of anchored mines, which consequently may be laid wherever the belligerent choses, in his own waters for self-defense, in the waters of the enemy as a means of attack, or finally on the high seas, so that neutral navigation will inevitably run great risk in time of naval war and may be exposed to many a disaster. We have already on several occasions insisted upon the danger of a situation of this kind. We have endeavored to show what would be the effect produced by the loss of a great liner belonging to a neutral power. We did not fail to bring forward every argument in favor of limiting the field of action for these mines, while we call very special attention to the advantages which the civilized world would gain from this restriction, since it would be equivalent to diminishing to a certain extent the causes of warlike conflicts. It appeared to us that by acceptance of the proposal made by us at the beginning of the discussion, dangers would have been obviated which in every maritime war of the future will threaten to disturb friendly relations between neutrals and belligerents. But, since the Conference has not shared our

views, it remains for us to declare in the most formal manner that these dangers exist, and that the certainty that they will make themselves felt in the future is due to the incomplete character of the present convention.

"As this convention, in our opinion, constitutes only a partial and inadequate solution of the problem, it cannot, as has already been pointed out, be regarded as a complete exposition of international law on this subject. Accordingly, it will not be permissible to presume the legitimacy of an action for the mere reason that this convention has not prohibited it. This is a principle which we desired to affirm, and which it will be impossible for any state to ignore, whatever its power."

(Scott, The Hague Peace Conference of 1899 and 1907, Vol I, pp. 585—586.)

The following is the reply of Baron Marschall von Bieberstein on behalf of Germany:

"That a belligerent who lays mines assumes a very heavy responsibility towards neutral and towards peaceful shipping is a point on which we are all agreed. No one will resort to this instrument of warfare unless for military reasons of an absolutely urgent character. But military acts are not solely governed by stipulations of international law. There are other facts: conscience, good sense, and the sense of duty imposed by principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German navy, I loudly proclaim it (je le dis à haute voix), will always fulfill in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization. I have no need to tell you that I entirely recognize the importance of the codification of rules to be followed in war. But it would be a great mistake to issue rules the strict observation of which might be rendered impossible by the law of facts. It is of the first importance that the international maritime law which we desire to create should only contain clauses the execution of which is possible from a military point of view—is possible even in exceptional circumstances. Otherwise the respect for law would be lessened and its authority undermined. It would also seem to us to be preferable to maintain at present a certain reserve, in the expectation that seven years hence it will be easier to find a solution which will be acceptable to the whole world. As to the humanitarian sentiments of which the

British delegate has spoken, I cannot admit that there is any country in the world which is superior to my country or my Government in the sentiment of humanity."

(Scott, The Hague Peace Conferences of 1899 and 1907, Vol. 1, pp. 586—587.)

On February 20, 1915, the Government of the United States addressed an identical communication to Germany and Great Britain which suggested that Germany and Great Britain agree:

1. That neither will sow any floating mines, whether upon the high seas or in territorial waters; that neither will plant on the high seas anchored mines except within cannon range of harbors for defensive purposes only; and that all mines shall bear the stamp of the Government planting them and be so constructed as to become harmless if separated from their moorings.

2. That neither will use submarines to attack merchant vessels of any nationality except to enforce the right of visit and search.

3. That each will require their respective merchant vessels not to use neutral flags for the purpose of *disguise or ruse de guerre.*

((Supplement to American Journal of International Law, July, 1915, p. 98.)

The efforts of the American Government to bring about a relaxation on the part of Great Britain and Germany of the retaliatory measures which each had adopted against the other failed and each preceeded to put those measures into operation.

The Institute of International Law at each of its sessions since 1906 has considered the question of laying mines, and it has adopted a series of regulations, the first of which forbids the placing of either anchored or unanchored contact mines in the open seas. (Annuaire, 1906, p. 88; 1910, pp. 429—457; 1911, pp. 286—302 ; 1913, pp. 227—228.)

"This rule, that of absolute prohibition," says Mr.

Garner, "is most in accord with the 'principle of the freedom of the sea routes, the common highway of all nations' and it alone will 'ensure to peaceful navigation the security to which it is entitled, despite the existence of war'—an object declared in the preamble of the Hague convention to be the principle by which the Conference was inspired." (American Journal of International Law, January, 1915, pp. 92, 93.)

The records of the submarine warfare during the present war also show that the rule of absolute prohibition is most in accord with the "principle of the freedom of the sea routes, the common highway of all nations." The submarine attacks upon neutral vessels especially afford striking proof of the soundness of the American contention that "the employment of submarines is impossible without disregarding those rules of fairness, reason, justice, and humanity which all modern opinion regards as imperative."

The reorganization of the laws of maritime warfare should begin with the fundamental principle of the exemption of all private property at sea, not contraband of war. The questions of contraband of war, blockade in time of war, the conversion of merchant-ships into war-ships, the status of enemy merchant-vessels at the outbreak of hostilities, the status of armed merchant vessels, etc., will not be difficult to settle if, as all the belligerents profess, the great aim is to establish permanent peace. If, however, the world is to contemplate another war like that now raging, no

agreement will be reached on the question of making the seas free, for there can be no freedom where suspicion rules. The whole policy of commerce destruction is an unjustifiable interference with innocent and legitimate commerce. As Mr. Choate said: "It tends to invite war and to provoke new wars as a natural result of its continuance."

But we have reason to hope that the delegates of the nations who will meet in conference after this war will have been so purged by the universal manifestations of sorrow and destruction that they will be less dominated by the sinister spirit of militarism and will co-operate with greater candour for the common welfare of the world.

IX. CONTROLE EFFICACE DES PARLEMENTS DANS LA POLITIQUE ÉTRANGÈRE

NOTES ON THE CONTROL OF FOREIGN RELATIONS

BY

DENYS P. MYERS, U. S. A.

There is criticism of the conduct of foreign policy and the methods of diplomacy. Some of it is definite, some nebulous. It is either in very general terms, or else directed at isolated and specific diplomatic decisions. The feeling of dissatisfaction is widespread, and it is apparently safe to conclude that where there is a great deal of smoke there must be some fire. A people, like a physician's patient, may be certain there is something wrong without knowing what or where it is; or they may be misinformed or badly informed.

It has been very popular in some quarters to make the diplomat the scapegoat of the European war, to characterize him simply as an intriguer pulling wires neither wisely nor too well. Especially is it urged that the diplomat as a trustee of the people's welfare has been recreant to his trust, and that things can be righted by the simple process of having legislative bodies take diplomatic decisions. The suggested remedy is apparently attractive to parliamentarians, some sociologists and those living in states where parliamentary action on treaties is required.

Very little has been said about two important conditions always faced by the conductor of foreign af-

fairs: 1. He inevitably is opposed to the proponents of other states, so that he is seldom an entirely free agent; and, 2. the problems with which he deals are usually of no one's choosing, being problems arising for the most part from coincidence or causes beyond his control. The line of diplomatic progress toward any goal can seldom be straight because the unforeseen is constantly happening to modify conditions. However unpromising his material, the conductor of foreign affairs must act, in many cases against his desires and frequently in conditions entirely beyond his control and which he personally regrets. The diplomat is surely entitled to have this said on his behalf.

This paper will consist largely of examining the actual conditions under which diplomatic work is done and the exact relation of government to foreign relations. It will be essentially an objective study of things as they are, with the purpose of finding positively the things that ought not to be. The world alone is the field of study, special conditions in any state being disregarded unless typical.

It should be kept clearly in mind that the whole problem of the control of foreign relations is a dual problem in constitutional and international law. The whole machinery of the conduct of foreign relations is determined by the municipal constitution and frequently is part of the constitution; but the action of the machinery manifests itself on the international plane. It is in the international field that war occurs, that foreign policies clash, that diplomacy feels its way and reaches its decisions, that treaties solve or stir up

problems. Yet all these have their origin within individual states and are given direction and character by municipal governmental machinery that is fixed as to form and which, like any machinery, tends to operate of its own inertia. This condition requires that any such study as the present one shall deal almost equally with the internal structure of the state and its external activities. Difficulties abound. Properly to understand the municipal organs for the conduct of foreign relations a preliminary examination of the structure of states must be attempted, but political scientists have chiefly devoted themselves to detailed study of a few states rather than to a study of principles in all states. International law, on the other hand, has emphasized practical principles and theory without venturing far into the philosophy of international relations. Writers of divers sorts who have attempted a philosophy of international relations have customarily written without proper knowledge or else for a preconceived purpose. It cannot be hoped, therefore, that this study will prove more than an honest attempt to define the content of foreign relations, to sketch broadly their conduct and to venture tentatively toward some obvious conclusions.

Elements of Foreign Relations. Before advancing farther into the subject it will be well to get a clear idea of the terms we use. It is necessary to understand what we mean by (1) foreign relations, and foreign affairs; (2) diplomacy; (3) foreign policy; (4) international law, and (5) treaties, for they are to a great extent overlapping terms and the content

of one is frequently made up of elements of the others.

1. Foreign relations, it may seem superfluous to say, constitute the intercourse between states as such. The synonymous phrase, foreign affairs, apparently has currency because „affaires" is the proper word in the French language to indicate government business and, French being the language of diplomacy, continental states speak of departments of foreign affairs. In Spanish the phrase is „relaciones exteriores", and it has naturally become current in Latin America. The only place where the two terms have come into juxtaposition in the same government is in the Congress of the United States, where the Senate has a Committee on Foreign Relations and the House of Representatives a Committee on Foreign Affairs. In English „foreign relations" has perhaps a wider connotation than „foreign affairs", but the differentiation between the Senate and House committees was for purposes of convenience. The difference in name saved, among the initiated, the trouble on each occasion of specifying „of the Senate" or „of the House".

2. Diplomacy is the management of foreign relations, the agency by which they are conducted. By the dictionary, diplomacy is defined as the art of negotation, thus emphasizing the method employed. A better definition is that of Count de Garden:

Cette expression, que l'on trouve usitée dans le langage des cours depuis la fin du XVIIIe siècle, signifie, dans son acception la plus étendue, la science des rapports et des intérêts respectifs des Etats, ou l'art de concilier les intérêts des peuples entre eux; et dans un sens plus déterminé la science ou l'art des négociations; elle a pour

étymologie le mot grec διπλαμα, duplicata, double ou copie d'un acte émané du prince, et dont la minute est restée....

La diplomatie embrasse le système entier des intérêts qui naissent des rapports établis entre les nations; elle a pour objet leur sûreté, leur tranquillité, leur dignité respectives, et son but direct, immédiat, est, ou doit être au moins, le maintien de la paix et de la bonne harmonie entre puissances.

Les principes de cette science ont leur source dans le droit international ou droit des gens positif qui forme la loi commune des peuples européens; ce droit présente l'ensemble des règles admises, reconnues, consacrées par la coutume ou par les conventions, et qui fixent les droits et les devoirs des Etats, soit en paix, soit en guerre..

Dans les limites qui sont assignées au domaine de la diplomatie, on comprend tous les points qu'il importe à une nation de poursuivre, afin d'assurer sa conservation, son indépendance et sa prospérité, et de se garantir contre toute entreprise de la part de l'étranger [1]).

A shorter statement is:

The elementary object of diplomacy in all countries and ages may be roughly described as the maintenance of international relations on terms of mutual courtesy, forbearance and self-control, such as regulate the intercourse of individuals in private life, the reduction to a minimum of causes of international friction, the actual avoidance or the indefinite postponement of recourse to war for the settlement of disputes between independent states? [2])

3. Foreign policy is an attitude toward other states, toward persons or toward things, assumed to be for the originating state's general good. Again quoting Garden:

Les différentes parties de la diplomatie doivent être envisagées sous deux points de vue principaux: l'un positif, fondamental et juridique; l'autre abstrait, hypothétique, variable, et qui est uniquement du ressort de la potique. Dans l'acception la plus générale, on entend par *politique* la théorie des fins de la société civile, de l'Etat,

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[1]) Garden, Histoire Générale des Traités de Paix, I, LXXXII—III. The same text appears in his Traité de diplomatie.

[2]) Escott, History of British Diplomacy, p. 1. London, Unwin, 1908.

prescrites ou permises par la raison pratique, et dès moyèns que l'expérience a démontrés les plus propres à conduire sûrement à ces fins. Celle-ci, soumise à la mobilité des circonstances, n'admet point de principes absolus, de maximes invariables; aussi, prince ou ministre, on ne devient homme d'Etat, en un mot, on n'apprend à gouverner que par le maniement des affaires; et dans cette carrière immense imposante, c'est l'étude de la scène du monde qui féconde le génie. „Là se rencontrent les difficultés majeures et les délicatesses de la diplomatie; là les règles fixes s'évanouisent; et comme dans le feu des batailles, le génie demeure abandonné à l'inspiration de ses seules pensées. Mise sur ce terrain, la diplomatie devient comme une tactique transcendante dont le globe entier est le théâtre, ou les Etats sont des corps d'armée, ou les lignes de combat varient sans cesse, et ou l'on ne sait jamais qui est ami, qui est ennemi. Parce que tout y est à inventer, ce n'est pas qu'il n'y ait beaucoup à savoir. La masse de ce qu'il faut connaître est immense; mais c'est un bagage qui n'est bon qu'à soutenir le pied, et rendre l'observation plus haute et plus sûre, et duquel on essayerait vainement de faire sortir un principe.... Il est nécessaire ici, avant d'entrepıendre aucun calcul, d avoir pénétré à fond dans les desseins des cabinets, démêlé avec soin, et souvent avec plus d'adresse qu'ils ne le font eux-mêmes, afin d'y accomoder les plans imprévus, leurs côtés faibles et leurs intérets, de posséder le secret de leurs ressources et de leurs forces, d'être en état, suivant les circonstances, de démasquer des vues propres soit à faciliter des alliances, soit à en déjouer, soit à ruiner celles qui étaient déjà conclues; d'avoir constamment à l'esprit le souvenir de toutes les précédentes manoeuvres des États de leurs traités rompus ou subsistants. Il y a là un dédale politique, avec un encombrement au milieu duquel le génie seul est capable de se mouvoir à l'aise et sans être étouffé par le détail [1]).

The talented Frenchman, the pedagogue of 19th century diplomacy, defined here the classic conception of policy based on the theory of inevitable enmities, which he considered operative as late as the 1860 's. But another spirit and theory of the good of the state is now familiar. The feeling has grown that it "is a poor diplomacy (policy) which can advance only when

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[1]) Garden, *op. cit.*, I, XCI—XCII.

protected by guns" [1]). A belated discovery that a state has duties as well as rights has served to point a way in policy to fostering friendships and to cooperating where possible. Talleyrand in his famous memorandum of November 25, 1792, describing the policy France ought to follow described the policy which alone any state dares today to proclaim:

The only real, profitable and reasonable leadership — that which alone becomes free and enlightened men — consists in being master at home, and in never entertaining the ridiculous pretension of being other people's master.... For states, as for individuals, the real way to get rich is, not by conquering and invading foreign countries, but by improving your own.... All increase of territory, all the gains of force or cunning, long associated by timehonored prejudices with the idea of rank, leadership, national coherence ansd superiority among the nations of the world, are but the cruel mockery of political folly and false estimates of strenght, increasing the expense and complications of government and diminishing the wellbeing and safety of the governed, for the sake ot the transient advantage or vanity of those in power [2]).

The declared spirit of foreign policy has for long emphasized the ideas expressed by Lord Granville:

In the opinion of the Cabinet, it was the duty and interest of a country such as Great Britain, having possessions scattered over the whole globe, and finding itself in an advanced state of civilization, to encourage progress among all other nations. But, for this purpose, the foreign policy of Great Britain should be none the less marked by justice, moderation, and self-respect, and avoid any undue attempt to enforce her own ideas by hostile threats [3]).

4. International law is an element at times controll-

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[1]) Deputy Vollmar in the German Reichstag, Berichte des Reichstages, March 19, 1897, p. 5170 C.

[2]) Cited in note 2 to Letter C, Unpublished Correspondence of Prince Talleyrand and Louis XVIII.

[3]) Lord Edmond Fitzmaurice, Life of Lord Granville, I, 49.

ing and at times only coloring foreign affairs, diplomacy and foreign policy. International law is, by definition, that law which applies between nations [1]. Of the whole body of ideas that are ordinarily called international law, some are universally practiced and undisputed; some are generally recognized and increasing in mandatory force; some are becoming precedented and tending toward phrasing in definite rules; and some are dependent solely upon the reasoning processes of writers. Any international question precisely and primarily involving any of the categories of rule will be controlled or colored by that fact. International law varies between being the traffic policeman on the highway of foreign relations and a mere guidepost indicating the route to follow. It is an instrument of diplomacy, but distinct from and frequently antagonistic to policy.

5. Treaties are contracts between states. Perhaps the best definition is that of Louis Renault, who defines a treaty as "l'accord de deux ou plusieurs Etats, pour établir, régler ou détruire un lien juridique". Unless their subject matter is a codification by substantially all the states of rules in international usage or for the guidance of all, treaties are not international law. Their much-talked-of sanctity is the sanctity of the contract, not that of the moral or universal law. Treaties may be political or nonpolitical. Of political treaties, Feodor de Martens asserted in 1899:

Actually the reciprocal rights and obligations of the States are

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[1]) See Alpheus H. Snow, The Law of Nations, 6 American Journal of International Law, 890.

defined, in a large measure, by the whole of what is called the political treaties, which are nothing else than the temporary expression of the fortuitous and transitory relations between various national forces. These treaties confine the liberty of action of the parties, as long as the political conditions under which they were drafted remain unchanged. If these conditions are altered, the rights and obligations flowing from these treaties must be necessarily changed. In general, the disputes arising out of political treaties chiefly concern so much a difference of interpretation of such or such a norm as the changes to be brought to this norm or its complete repeal.

As to nonpolitical treaties, of which we shall have much to say, they are also of a temporary character. They result from the emergence of practical questions of one type in quantity and are negotiated to give a rule of action by which to conduct public business concerning a particular class of international relation.

All treaties may be said to be manifestations of minor policy. Showing the direction a state's international relations take, treaty contracts afford evidence of the character of the state. Treaties in foreign relations may be likened to that part of dough which has become fixed in form and character by being baked into loaves [1]).

[1]) Easily nine-tenths of all treaties are of nonpolitical character. Computations from the published treaty volumes of all countries and of all times lead me to conclude that some 25,000 treaties are in existence, of which about two-fifths are in force. The last century has produced more treaties than all the past, if an actual examination without actual count can be trusted. But if 10,000 treaties are now currently in force, not 500 of them are political. The rest — the great majority — are administrative or regulatory. To some extent many of these directly or implicitly have a political bearing, but inclusion of all such would not more than double the number of political treaties, those involving policy.

In a certain aspect, however, all treaties involve policy, because they

Origin of Foreign Relations. The historical origin of foreign relations as part of the business of modern government has colored their conduct. When the Italian free cities in the middle ages began to erect into a system the sending of diplomatic missions, they acted upon the fundamental impulse of all diplomacy, protection of the interests of the state. But the conditions of the time gave character to the innovation. Military conditions alone prevailed in Europe and the Italians found themselves incapable of withstanding the ambitious secular rulers whose policy had hardened into a habit of seizing military control of Italy in order to bring physical pressure to bear on the papacy when the Holy See periodically came to award the crown of the Holy Roman Empire. Not being able for reasons of strength to play an equal hand by force of arms in this game and being continually injured by the military incursions, the Italian city-states began fighting their defensive battles with wits rather than fists.

When diplomacy acquired a recognized place in the scheme of governmental affairs it was considered only a part of the mechanism of war, a method of gaining results without fighting or of securing greater results

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do not constitute international law, which in conventional provisions is to be found only in a comparatively few declarative documents multinationally negotiated and generally signed and ratified. Every bipartite treaty records that two states have agreed on a rule between them. The tendency is for treaty provisions found satisfactory to be employed frequently and in the course of time to take on a similarity very close to identity. Extradition treaties illustrate the process, such conventions now practically conforming to one model; codification into an international convention being the next logical step, thus adding a chapter to positive international law.

from the fighting. This character was inherent in diplomacy until various phases of foreign relations originating in peace problems came to be exclusively within the jurisdiction of the foreign office. Though the old character has not entirely departed from the diplomacy of the European system, it is true that diplomatic relations now tends to displace warlike relations as the normal and primary method of international intercourse. Today war is acknowledged as the outcome of policy and, as Clausewitz says, is simply a new phase of pursuing a political purpose. Diplomacy, the vehicle for conveying policy into realization, has thus tend to become the master of war, to which it was originally servant.

Foreign affairs in their conduct are predicated everywhere on the legal position of war. The logic of political science is outraged by war's legal position in international relations, but its place cannot be denied. As things are — not simply because of the European conflict but inherent in the present fabric of civilization — war is legally recognized. It is the prosecution by force of a state's conception of its right, and no existent rule even attempts to impose boundaries for its initiation. [1]) In practice some types of difference

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[1]) The United States with 30 states, and Argentina, Brazil and Chile among themselves, have by treaty agreed not to declare war before legal inquiries and reports have been made. It is greatly to be hoped that the example will be generally followed, but these treaties do not now constitute international law, but only an international precedent. They, of course, bind the contractants where they are completed. The treaties in question, however, are not phrased so broadly as to include non justiciable and determined acts involving life or wilful and continuing

which once caused war do not now do so; but you can search in vain for any international declaration that obsolescence renders them illegitimate. War, then, is a status which is entered solely at a state's discretion. No state can turn to any rule during a dispute with another and definitely determine that thits difference is not to be a *casus belli* in the judgment of the other. No guides except the impalpable ones of judgment and reasoning serve to indicate when diplomacy's sanction may be resorted to. A vicious condition due for a change, but nevertheless a real one not to be overlooked.

The Purpose and Conditions of Diplomacy. The fundamental purpose of all diplomacy and the conduct of all foreign relations is to forward the interests of the state beyond its own borders. The primary object of foreign policy is advantage to the state, not justice. This must, however, be understood in a wide sense of the word advantage, for it is profoundly true that permanent advantage for one state cannot be based on injustice to another. Yet the essential quality of diplomacy is cognate with that of the debate, in which the advocates making the better argument win. The art of which Socrates spoke, of making the worser cause appear the better, is inherent in any negotiation.

Foreign relations have never been at this stage of depending solely upon advocacy. When permanent embassies first began to be employed by the Italian

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acts, in which latter cases wilful acts offer no basis for investigation and continuing acts operate to free the aggrieved party from the treaty engagement after the first instance.

republics, the Justinian code and the arbitrament of the Papacy furnished standards of experience and semi-judicial control; by the time when the system of sovereign states, with which we are dealing, was established in 1648. Grotius had laid down the main lines of international law, which ever since has steadily become a stricter code for the guidance and control of diplomacy. The law — that is, the formulated experience of mankind — for nearly three centuries has played an increasingly important part in stabilizing international relations.

Criticism of the conduct of foreign affairs is, thanks to this circumstance, really directed at a comparatively small part of foreign office activities. A careful computation on the basis of the business done by the United States Department of State indicates that 95 % of alle matters coming up for action are settled directly on a basis of law. It is, of course, true that a larger proportion of American foreign relations fall within the fields of extradition, nationality, etc. than elsewhere; and that American policies are less complex than those of Europe. If we define such matters capable of direct settlement, according to rules already determined, as adjectival problems, it is probably safe to say that even in Europe three-fourths of all chancellery business in adjectival.

What of the rest? A considerable familiarity with the diplomatic documents of the two last centuries in Europe impels me to believe that probably 15 % more of chancellery business differs from the above class only by reason of novelties in the problems rai-

sed. Instead of yielding to solution by a simple application of one or several determined rules, they are soluble only by a complex application of rules, by corollaries deduced therefrom, or even by projecting settled principles into new fields. These cases are those which advance international law. Adjectival cases add only a wealth of precedents; this 15 % of novelties adds to the subject matter. They are substantive.

As an illustration may be mentioned the case of Don Pacifico. Don Pacifico was an English Jew resident at Athens in 1847. The Athenians were accustomed to burn "Judas Iscariot" in effigy at Easter, but that year the authorities attempted to prevent the ceremony owing to the presence of Charles de Rotschild in the city. The mob resented the action and attacked and plundered Don Pacifico's house. He lodged a complaint with the Greek Government, which took no action. Believing that a Jew would have little chance of justice in the Greek courts, he appealed to the British Government, which made demands on Greece. On these being refused, an embargo was laid by Great Britain on Greek shipping. A commission eventually awarded Don Pacifico's damages. The rule that a state may protect its citizens abroad against denial of justice by resort to reprisals, if necessary, is deducible from the case; and, though much criticized, is followed in practice.

There remains some 10 % of chancellery business to be identified. The reader cannot fail to recognize that the other 90 % as described is chiefly routine, involv-

ing the finding of facts and the application of rules to them. The remaining tenth may be said to involve policy. Policy is popularly undistinguished from law or administrative rules. A clearer conception of it is needed. Being an attitude of a state, assumed to be for its general welfare, there is nothing legal about it, though policies in the past have presided over the birth of legal relations, sometimes at the expense of what law aims at, justice. Real justice in practice consists of a balancing of adverse rights. Its test is found in the fact that the parties remain satisfied with its operation, or are unable to advance arguments strong enough to secure a revision in their favor. A purely moral idea of justice can have no decisive weight in practical affairs, because these affairs are not ideal.

Policy as a basis of action was evolved out of the painful efforts of the past to secure stability of international relations. It began at the wrong end, as did all political science. For not until the rise of nationality in France in the 15th century did there emerge the plain condition that international affairs can only be made stable by being based upon a series of healthy national communities, each working out its own destiny freely and developing cooperatively rather than by sheer rivalry. With the principle of sovereignty developing and insulating the national state for the process of free development, the political pundits again took up the problem by the wrong end. They sought peace by making phrases instead of by searching their own souls. They generalized theories or courses of action from current condutions and erected the results of

their ratiocination into systems of policy that were uniformly bad and had in common the very grave fault that every one was formulated on the *status quo*. Moreover, they were all personal products, not the products of principle. Time passed and rulers died; the *status quo* of the present became that of a past day, and new personalities asserted their right to try out their theories. Queerly enough, the inventors of systems operated on a theory of innate enmities, which is now obsolete by intervening disproof. They never seem to have stumbled upon the opposite idea, that friendships might be fostered and eventually might qualify all their international relations. The system of natural and perpetual enmities paled and faded from sight in the light of a rapidly revolving world. It is now obsolete [1]).

Policy in the 19th century became a more modest thing. It became more transitory, but above all it became more national. It ceased to be based on a mere aphorism and became subject to the tests of a forcible motive and a present definite object. The older process was reversed. A present reason generated an attitude of the state. an aphorism usually being found to visualize the idea. In the earlier scheme it was sought to make current events conform to an aphorism put out in advance. Statecraft had reached the sensible habit of carryring an umbrella when it rained and of putting on a straw hat when it was summer, instead of trying to order the political seasons according to

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[1]) On this whole question see Mountague Bernard, „Systems of Policy", pp. 60—109, in Four Lectures on Subjects Connected with Diplomacy, London, Macmillan and Co., 1868.

preconceived notions. The new thesis allowed friendliness a certain opportunity to develop between storms.

Modern policies, then, are objective, and they are based on national interest. They are not in the least legal, and, in fact, are much colored by the recognized right of war, or self-help, in the actual scheme of international relations. Policy, is, therefore, not wholly a deduction of what is due to the state by reason of its sovereignty and of its possessing the sovereign attributes of existence, independence, equality, domain and jurisdiction. Policy now, as in the past, becomes based in many instances on a confidence in military power. A puissant, progressive state may tend to foster its own interest by ostentatiously wearing its shining armor, while behind the action of most powerful states the element of military strength looms as one of the factors. A lesser state, however progressive, finds its definite policy in acting so correctly that its larger diplomatic antagonist may never find it with the handicap of a bad case to furnish an incentive for employing its strength as a makeweight. "In our days the principles of law are conserved in the bureaus of the ministries of the great powers, which on each occasion take from their correspondence the dispatches and writings which justify them, and, if this justification is not very good, brute force always remains to them to make it accepted" [1]).

Still further to understand our subject, it may be

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[1]) Belisario Porras, delegate of Panama to Second Peace Conference, 2 *Deuxième Conférence*, 336.

well to look at these three categories of questions in respect to their solubility. Unless policy is inmate in the first two, they offer no dangers. Negotiators dealing with them are constrained to seek just solutions, if for no other reason, then because the experience of the past as bodied forth in the rules of law or custom circumscribe the possibilities of selfish intention. As soon as diplomacy fails to solve them methods of pacific settlement are normally called into operation.

With questions of policy it is different. They represent a philosophy or purpose of national life and may be entirely novel in application or reaction upon second parties. A policy affecting another state beneficially will tend to make it friendly and a co-operator; but if another state is affected adversely, friction is the more probable because neither state has much but sheer self-interest to support its claim. In these matters a state is groping its way, and even so astute a statesman as Bismarck scored most of his diplomatic successes by agility of mind rather than the overpraised policy of "blood and iron", which in the European arena was largely bluff.

It is eminently fitting that policies in their essentials should be national, and it is therefore desirable that parliament should know of them. Chancelleries in establishing policies initiate long commitments of uncertain ratifications. They will sound more in justice and be closer to actual national aspirations if some parliamentary review of them is had; and, with such a review, mere political intriguiging will be at a disadvantage.

Two systems of handling them exist. States dealing with foreign affairs according to the American plan interpose the parliament as a consenting party to treaties, this co-existing with the election of executives for a definite period. As a matter of fact, in all such states there are policies purely executive, which never come before any part of the parliament. Side by side with the European plan of executive treaty ratification is a system of interpellations and votes of confidence, which are likely to throw a governement out of power. On the whole it would seem that the European system is the more direct. But it is true that not all Europe has the vote-of-confidence system.

Foreign Relations in Government. There is more representative character in foreign affairs than is commonly believed. The contrary opinion is due to an exaggerated conception of the legislative department of government. In the actual constitutional conditions of the present, it is not true that the legislative department represents the people in any more real sense than the executive department. It is only true that the representation is ordinarily more direct. Speaking generally, the system is that the people select by vote a legislature, the dominant party in which sets up the executive department of the government of the moment. The two stand and fall together, and to believe that the executive is lacking in responsibility is to believe an untruth. The few notable exceptions only emphasize the general fact, though they unduly affect international politics.

It is in the states otherwise most democratic in cha-

racter that the executive department is independent of the legislative. Yet in all the world executives alone bear the primary responsibility for foreign relations, And the phenomenon is noticeable that the most democratic states have executives elected for a definite period. Except for treaty engagements, they can give any direction they please to foreign relations during their tenure. Only a few autocratically organized governments give the executive more control. Cabinet government, which prevails in Europe, makes the executive cabinet dependent for tenure upon a vote of legislative confidence, which can be proposed almost without restriction.

The conduct of foreign relations is, of course, an executive function. This is recognized as the fact throughout the world, regardless of governmental types. The constitutional systems of all but a very few states provide effective means either to dismiss cabinets from power when they lack legislative confidence or to refuse a further mandate to executive officers periodically elected. Either method renders the responsibility of the executive in charge of foreign relations very real. The legal legislative department of all governments possesses another potent, though indirect, means of influencing the conduct of foreign relations. This is the control of the purse. Again with only a very few exceptions the legislative organ of governments receives what amounts to a report on foreign affairs when the ministerial budget is voted. Cabinets or ministers have fallen frequently enough at that time to demonstrate that such control is not a negligible circumstance.

Moreover, the present sanction of national diplomacy, war, gets its going funds from the legislative department of the government. In many states the legislature participates in the declaration of war, and everywhere votes the funds for its conduct. Throughout Latin America the legislative department votes war, while the executive declares it. In the United States, Congress declares it, thus possessing an executive function. In Europe's constitutional monarchies the ruler usually has large liberty in respect to declaring war, the apparent reason being that the act has been left to his discretion as a historical prerogative, while the people have aimed at restricting its employment through assuming control over the funds.

Two facts become clear from these summaries: 1, foreign relations annually come under legislative review in all but a few states either through democratic methods which will be detailed later or through voting of a ministerial budget; and 2, the ultimate misfortune of war depends everywhere upon legislative financial support.

This amount of legislative control over foreign relations is sufficient to make the legislative department measurably responsible. As one watches the coursing of foreign questions through parliaments, indifference on the part of legislators is the most salient phenomenon. In any legislature there is only a bare handful of parliamentarians who take an active or intelligent interest in affairs beyond the border. Legislators do not ordinarily live up to their responsibility where they have it thrust upon them by constitutional prescript-

ion, and almost inevitably they view the question that projects beyond the boundary from the insular point of view of internal politics. It is easy to retort that men whose concern in such matters is uncertain of effect have no incentive to become experts; but careful and competent observers have usually seen little to commend in legislative intervention where it is a normal possibility.

The fact seems to be that for the most part foreign relations are too delicate and based upon considerations too impalpable for large bodies of men to deal successfully or even intelligently with them. Foreign policy, which is so peculiarly a matter of philosophical striving toward an imaged goal, is at once the part of foreign relations subject to most multifarious interpretations and most important to protect from the error of mistaking intrigue for statesmanship. Thus foreign policy is on the one side unsuited by its nature for legislative origination and on the other open to the dangers of over-refinement and casuistry when left entirely in the hands of ministers. Policy is so elusive that it may never be affected by treaty provisions. In the United States, in fact, where all treaties are subject to approval by the Senate, before ratification, each administration pursues policies almost as ardently as European statesman in their palmiest days, without any possible legislative control whatever unless policies casually appear in treaties or require the passage of laws. For decades the Monroe doctrine was a purely executive policy; several administrations extended the doctrine without legislative assistance; a late administration

encouraged financial investment abroad, etc. Blaine's Pan American policy was long executive and early legislative action concerning it was, in the early days, taken in a humorous spirit; the „open-door" policy of John Hay was and, in so far as it remains is purely executive. These instances might be multiplied for the United States or for other states regardless of their democratic institutions. Legislative intervention, then, in foreign relations has very slight effect on foreign policy. The predominating system of government by which the executive is either elective or dependent in tenure upon holding a legislative majority may be claimed to be satisfactory and scientific in permitting representative control of foreign relations in their various phases. Several important states exist, however, where neither system prevails.

Handling of Foreign Relations. Systems of handling foreign relations may be distinguished as of three types, which we may designate as the continental, the executive, and the American. The American type is characterized by an imposed agreement between the executive and legislative departments of government before treaties can become binding upon the state. The continental type is characterized by a less complete dependence of the executive upon the legislative department in respect to treaty ratification. The executive type is characterized by an almost complete independence of the executive respecting treaty ratification.

All systems recognize definitely that the conduct of foreign relations is an executive function. None denies

the patent facts that it is the place of the executive to speak and act for the state, and, in all matters not definable as legislation, that the minister can definitely bind the state. Innumerable decisions under all systems are reached by the department of foreign affairs without any but the executive branch of the government knowing anything of them until they are recorded facts.

Even where diplomatic correspondence is regularly and extensively published it is fairly innocent in appearance. What is not said is usually more important than what is; and the real actuating motives of policy in a given case seldom get set down in type anywhere. If an official must know what lies behind, the secret session of a committee or legislature or a verbal conversation is resorted to everywhere. Such methods — being universal — must have reason behind them, for they are practiced by the most radical democracies even more than under the autocratic procedure, which is criticized.

The conspectus appearing as a part of this report indicates in an imperfect way the conditions existing as a result of constitutional provisions and of executive or legislative practice. Such a tabulation cannot be entirely scientific because in different states identical practices are modified in action and at different periods. Moreover, in one state a stipulated method may be extensively employed while in another the same method may be seldom used. Ministerial discretion in relation to parliamentary intervention is also a widely varying circumstance. The Swedish sys-

tem, for instance, is at first sight much less responsible to the Riksdag than is the American one to Congress. Yet in Sweden at the "remiss" debate any member may ask that the conduct of any minister be referred for consideration to the Constitution Committee, which is a joint committee of 20 members elected on the proportional method from both houses. The committee cannot suppress a motion on foreign affairs, though this must be referred to the committee before a vote. Then, if the house decides in the affirmative, the minister must answer the interpellation, on which debate may occur, but without a vote. Thus any question relating to foreign affairs can be forced into discussion by purely legislative decisions. In the United States the Congress can only call upon the President for information, which is furnished by the secretary of state for transmission, „if not incompatible with public interest". Behind the use of this phrase and the frequent refusal of information as a result, many legitimate reasons may lie. None but executive discretion controls the publication of documents in the annual „Foreign Relations" volume, which is issued as a House of Representatives document; and only executive discretion determines when the volume shall be issued, its appearance at present being timed five years after the twelvemonth with which it deals. Thus, variations in detail of national systems render bald descriptive terms inaccurate as a basis of conclusions.

It is consequently necessary as well as desirable for the clear understanding of the actualities dealt with to sketch in succession what have been indicated to be the

three distinct types of conduct of foreign relations. Since the practice of foreign relations as a generic element in government began in Europe and because international politics has always been dominated by the great powers, a historic logic will be obvious in the experiences of the European states. The continental is the most complicated system.

a. The continental type can be appreciated best by keeping constantly in mind that foreign affairs were originally the sole prerogative of the ruler and that the modifications of that prerogative were brought about by the assertion of popular rights through legislative channels.

The French system is chosen to illustrate the type because of the extraordinary constitutional history of the country. Democracy burst forth in Europe as a system of government, rather than a condition, in the French Revolution of 1789. Even before then the Etats-généraux held an exceptional position on the continent of Europe. After that date, until the constitutional laws of 1875, France, alternately monarchy and republic, had 14 different constitutions. Nowhere else in Europe has there been a better laboratory of political science. The fact that the constitutional laws of 1875 have lasted for 41 years indicates the attainment of stability. The law of July 16, 1875, "sur les rapports des pouvoirs publics", — the provision adopted after a unique constitutional experience — indicates what was deemed safe and workable. It provides:

ART. 8. Le président de la République négocie et ratifie les trai-

tés. Il en donne connaissance aux Chambres aussitôt que l'intérêt et la sûreté de l'Etat le permettent.

Les traités de paix, de commerce, les traités qu'engagent les finances de l'Etat, ceux qui sont relatifs à l'état des personnes et au droit de propriété des Français à l'étranger, ne sont définitifs qu'après avoir été votés par les deux Chambres. Nulle cession, nul échange, nulle adjonction de territoire ne peut avoir lieu qu'en vertu d'une loi.

ART. 9. Le président de la République ne peut déclarer la guerre sans l'assentiment préalable des deux Chambres.

The constitutional law of February 25, 1875, "relative à l'organisation des pouvoirs publics" contains the following:

ART. 6. Les ministres sont solidairement responsables devant les Chambres de la politique général du gouvernement, et individuellement de leurs actes personnels.

Le président de la République n'est responsable que sans le cas de haute trahison.

A mere glance at these provisions shows that the constitutional system for the conduct of foreign relations in France takes no cognizance of policy and does not attempt to interfere with diplomatic action. The following are details of parliamentary control over treaty-making [1]:

1. The Chambers may specifically authorize the executive to conclude treaties, thus waiving their right to pass upon a document which otherwise would come before them. In this case the legislative department fixes a policy within its constitutional control.

2. On the other hand, executive freedom of action cannot be restrained by legislation regulating matters to be made the subject of future treaties. In this case is recognized the impotence of the legislative depart-

[1] Louis Michon, Les traités internationaux devant les Chambres, *passim*.

ment to dictate to the executive in matters which the latter must freely agree upon with a third party, a foreign government.

3. The Chambers do not presume to revise the text of a treaty. Where they act they pass a law approving the treaty text, integrally annexed thereto. The apparent reason is that the legislative department does not assume to dictate specifically what must be negotiated but confines itself to stating definitely what it does accept or, in a converse case, what it does not accept.

4. Treaties involving a modification of territory must be approved by the Chambers. The soundness of the provision is evident when one recalls that changes in territory involve changes in population and therefore in the status of citizens. Approval must be had both for acquisition and for relinquishment of territory.

5. Treaties of peace must be approved by the Chambers. This provision is apparently based objectively on the supposition that, the state being a victor, there would be acquisition of territory and, the state being defeated, there would be relinquishment of territory, or an indemnity. (Cf. No. 7).

6. Treaties of commerce, including their most frequent form of treaties of friendship, commerce and navigation, must be approved by the Chambers. Treaties of an accessory character are subject to the same condition. The apparent reason is that commercial matters are primarily a legislative consideration, and that the executive in negotiating treaties of commerce essentially acts as direct agent of another department of government.

7. Treaties engaging the finances of the state must be approved by the Chambers. This provision is interpreted as relating to treaties which can be executed only by engaging the finances of the state. Its scope in practice has been held to include telegraphic, postal, postal money-order, parcels-post and monetary conventions. The evident reason is that control of the public moneys rests with the legislative branch of the government.

8. Treaties relative to the status of French persons abroad must be approved by the Chambers. This provision apparently found its way into the constitutional law on account of the casual circumstance that at the time (1875) certain treaties of the category were pending. The opinion of French publicists shows a trend against considering extradition treaties as subject to approval.

9. Treaties relative to the property rights of Frenchmen abroad must be approved by the Chambers. Municipal legislation respecting foreigners is an essential attribute of the Chambers and this provision seems to have contemplated that the Chambers, by approving treaties defining property rights of Frenchmen abroad, would thereby become obligated to reciprocate legislatively for foreigners in France.

10. Treaties of arbitration and arbitral compromis are assimilated to treaties requiring approval by the Chambers, if the powers of the arbitrators exceed those of a judge or if they relate to the previous categories of subjects.

11. Articles of treaties not as a whole falling within

the above categories must be approved by the Chambers. These are usually treaties engaging the state to international administrative regulations or tending to secure uniform practice. Municipal laws must be changed to conform or new laws passed, and it obviously makes for harmony to have both the international and national phases of the problem acted upon by the legislative branch of the government.

Treaties which do not require approval by the Chambers are:

1. Extradition treaties, on which there is dispute, but on which opinion tends to this conlusion.

2. Administrative treaties, by which term is understood those relating particularly to the fixation of various documentary forms and those relating to the manner or method of conducting affairs which originate in one country and are completed in another.

3. Political treaties of all kinds, unless they fall in whole or in part within the categories enumerated above.

4. Treaties of alliance.

5. All treaties until the interest and safety of the state permit their transmission to the Chambers. This substantive constitutional provision leaves it to executive discretion when any treaty shall be brought to the knowledge of the Chambers. For treaties not requiring approval by the Chambers, it therefore legalizes and regularizes so-called secret treaties.

Substantially this system obtains in all the states of Europa, except Austria-Hungary, Great Britain, Russia, Portugal and Switzerland.

In so far as this continental system relates to treaties, it is probably the most fluid system. It leaves political treaties within the control of the executive, which, however, is dependent upon a parliamentary majority for its tenure of power. Political treaties, and policies not embodied in treaties, are therefore subject to popular control, for no cabinet will deliberately adopt policies or political alignments that would result in its own defeat. Questions of policy are things of delicate nuance, and it is the cabinet — a small body of men closely in touch with conditions — rather than the legislature — a large body of men incapable of reaching careful conclusions on subjects of pure reason — which is intrusted with appreciating what politiclal theory is best at a given moment for the state to adopt in its foreign relations [1]). Most nonpolitical treaties, on the other hand, and those engagements affecting attributes of the sovereignty for which the legislature is primarily responsible depend upon its approval. Such treaties invariably affect the citizen or depend upon legislation for their effectiveness. Political treaties are engagements of the state as a collective entity and as such are logically concluded by an organ representing the collectivity. Nonpolitical treaties, on the other hand, are engagements on behalf of the individuals who make up the state, and as such logically require

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[1]) A legislature, it is true, often reaches decisions involving very delicate distinctions, but these are not in the domain of pure reasoning. They are possible because of the representation of numerous physical interests, all of which being heard equally, a delicate resultant of forces emerges in the decisions.

for their conclusion and internal force the assistance and consent of an organ representing the individuals. This seems to be the explanation of the distinction customary in what we are terming the continental system, which, respecting treaties, according to Ebreu, is the most satisfactory system.

This continental system viewed as a system of diplomacy employs a more or less hereditary body of diplomats, and throughout their activities historical habits color public business. European archives — and this applies all over the continent — are too full of dead precedents imperfectly sloughed off. One instance will suffice. The ambassador began life in Europe as a cross between a plenipotentiary and a privileged spy. He wrote home interminable letters of gossip and business and fear-ridden speculation and he served to support thereby the now obsolete system of enmity. All European diplomatic business was conducted with a precision of detail and a slavish following of forms that can be equalled only by the rarefication of idiocy which too often characterize American municipal court procedure. Great improvements in this respect have taken place in European diplomacy, but it is not many years since a European publicist commented to an American that the annual volume of "Foreign Relations" interested and instructed him more than any other such publication because of "the freedom and originality with which questions were treated".

European policy has been similarly trammeled by historical considerations, and the machinery for handling the conduct of foreign relations described here as

the continental system has not radically affected the condition. The general tendency of the last few decades toward objectivity and the emergence of new political problems of a purely modern character in foreign relations have been the principal effecting change. This process had caused many improvements before the war and the new political conditions after it will certainly accelerate fundamental betterments.

b. The executive type of the conduct of foreign relations has been less affected by parliamentary institutions than any other. Yet the differences are at first sight not connected with foreign affairs. Systems of handling treaties, of taking cabinet decisions, training and appointing diplomats, publishing documents, etc., may be almost identical and yet the systems as a whole will fall into different categories. If one should attempt to lay down a rule that would serve to test the systems indicated, it would probably be found in answering the question of where the sovereignty [1]) of the state centers. The practical answer to this question is a matter capable of much technical disputation, and there is no single criterion for determining it. Where there is a constitutional legislature a tendency will be found to make it a residing place, and this is a

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[1]) Sovereignty is in this case internal sovereignty, not the external sovereignty of international law. For our purpose the theoretical origin of sovereignty in the people is not as important as what organ of the government actually and effectively represents the people as their sovereign agent. Very useful discussions of the subject are „The Limits of Sovereignty" in „Essays on Government" by A. Lawrence Lowell and the „Nature of Sovereignty" in „Studies in History and Jurisprudence" by James Bryce.

normal trend because it is the people from whom sovereignty emanates and who decide what agent of government shall exercise its attributes. A sovereign people is strongly tempted to make all delegation of sovereign power as direct as possible; but it must be borne in mind that power is not necessarily better exercised for being employed at its source. In fact, every constitution complicates the problem of determining in detail the distribution of sovereign powers.

The executive system of government will therefore be found to be the simplest of all, but it exists in its pure form in no considerable modern state. Abyssinia, Afghanistan, Persia and Siam are current instances. Japan and Russia represent transitional stages in which legislation is popular, but in which most other functions are left to the chief of the state [1]). Germany represents a slightly further development complicated by local and historical considerations. Great Britain represents a stage in the transference of sovereignty to the people that is really complete as to theory but is in many respects not evident as to form. Thoroughly to appreciate the executive type of foreign relations, therefore, it will be convenient to examine the methods of Russia, Germany and Great Britain as typical of various stages of the executive type. As legislation as the first function of government, is the first to be affec-

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[1]) Turkey cannot be called exactly in a transitional stage, for it is not certain that popular government will develop normally in that state. Nor can the Sultan be considered as entirely sovereign since he is subordinate both to the Koran and the Sheri, or sacred law, which fetwas can only interpret, not alter.

ted by direct popular action, so foreign relations is the last and the least capable of useful popular control.

1. Russia presents the executive type in a fairly pure form. By sections 12 and 13 of the Russian fundamental laws the Tsar is supreme respecting all relations of the empire with foreign powers. To him is reserved the management of foreign policy, he declares war, concludes peace and concludes treaties with foreign powers. These prerogatives are jealously guarded and are excluded from the competence of the Duma. Interpellation, according to the manifesto of August 19, 1905, is subject to the following provisions:

Sec. 6, 57. Notices of interpellations regarding an alleged infringement of the law by ministers, chiefs of departments or subordinate officials must be signed by at least 30 members of the Duma and handed to the president, who shall submit them to a plenary session.

58. If the majority approve the interpellation, it shall be communicated to the minister or chief of department concerned.

60. Ministers or chiefs of departments shall reply within one month of the receipt of interpellations, either giving explanations or intimating why it would be impossible to do so [1]).

It will be noticed that the minister must reply to an interpellation concerning an alleged infringement of law.

Foreign relations are, however, customarily discussed in the Duma only when the budget of the ministry of foreign affairs is presented by the budget commission. The Duma possesses the power of refusing to vote a budget credit for the ministry. Sir George W. Bu-

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[1]) London *Times*, Weekly Edition, 1905, page 533.

chanan [1]) states that the foreign minister "can make a statement on foreign policy only by special command of the emperor." It would seem, then, that the Tsar has complete control of foreign relations with the exceptions of depending upon the legislative body for the necessary funds and of the necessity of satisfying the same body that laws have not been infringed.

II. Much more complicated is the German system. This is partly due to the circumstance that the empire was built around Prussia, including the Prussian constitution; and partly due to the political theories of Bismarck, which included the idea of divine right. It is a system designed to attain results rather than to obey any logical tenet of political science.

The real responsibility, or lack thereof, is to be found in the Constitution.

ART. 11. The presidency of the federation is vested in the king of Prussia, who bears the name of German emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same, enter into alliances and other conventions with foreign countries, accredit and receive ambassadors.

For a declaration of war in the name of the Empire, the consent of the Federal Council shall be required, except in case of an attack upon the territory of the Confederation or its coasts.

ART. 15. The Chancellor of the Empire, who shall be appointed by the Emperor, shall be chairman of the Federal Council, and shall conduct its business.....

ART. 17. The commands and demands of the Emperor shall be issued in the name of the Empire, and require for their validity the signature of the Chancellor, who thereby assumes the responsibility.

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[1]) Treatment of International Questions by Parliaments, etc., British Parliam.-Papers, Miscellaneous, No. 5 (1912), page 21.

It takes no imagination to picture the situation opened up by these provisions and actually in operation. Germany has no truly representative system for the conduct of foreign relations. On the other hand, the system is not of a pure executive type, for this implies strictly a minister's sole responsibility to the ruler. As a matter of fact, political scientists have never agreed where the internal exercise of sovereignty resides in the German Empire [1]). Many constitutional peculiarities render that problem extremely debatable, but it is certain that the conduct of foreign relations is an attribute of the chancellor and that responsibility respecting such relations is found wherever his authority originates. Now the chancellor is at once the agent of the Bundesrath, which represents states of the empire, and the appointed subordinate of the emperor. The minister of foreign affairs is, in turn, subordinate to the chancellor and is simply his representative. The chancellor, to go further into detail, is customarily prime minister of Prussia and the emperor is constitutionally king of Prussia, the dominant and principal state of the empire; and the imperial secretary of state for foreign affairs is ex-officio a Prussian minister of state. Pursuing the analysis further, it appears that this Prussian body of ministers lacks cohesion as a cabinet and is responsible as individuals only to the king, who is by virtue of office German emperor.

[1]) A theory not yet put forward so far as I know and worthy of consideration is that the sovereignty of the German Empire resides in the praesidium which forms the subject of Part IV, Arts. 11—19 of the constitution. This theory would place the sovereignty in the president of the confederation and the chancellor.

Going in another direction, we find that foreign relations are decentralized in respect to intervention in them by the Bundesrath. It was due to Bismarck that the only federal minister is the chancellor, "who has subordinates but no colleagues." His plan was to give the Bundesrath general control of imperial affairs, except military and foreign. Though Bismarck did not succeed in having this plan adopted, in form, it really indicates the substantial practice. The Bundesrath constitutionally organizes seven permanent committees from its own members and an additional one, of which Art. 8 of the constitution speaks as follows:

Besides, there shall be appointed in the Federal Council a committee on foreign affairs, over which Bavaria shall preside, to be composed of the plenipotentiaries of the Kingdoms of Bavaria, Saxony, and Wurtemburg, and of two plenipotentiaries of other States of the Empire, who shall be elected annually by the Federal Council.

It will be observed that Prussia does not possess any definite position in this committee, although it is that state in which the actual conduct of foreign relations is vested. Some idea of the importance of the committee can be gained from the fact that for 35 years the committee was never convened and that from 1871 to 1908 only two meetings were held. Since the domestic crisis of 1908, Bavaria has established the practice of convening the committee in connection with any question of great magnitude and lasting public interest. The proceedings are confidential and unanimity seems to prevail.

Parliamentary procedure scarcely affects the executive's control of foreign relations in practice. Questions may be referred to the budget committee of the

Reichstag, which consists of 28 members appointed by leaders of the various parties. Neither this committee nor its subcommittees can send for persons, paper or records, but must ask the president of the Reichstag to do this; but ministers can always make statements to the committee, and regularly do. The committee's reporter makes a verbal report to the Reichstag. Proceedings are secret, but reports of the sittings are issued. Interpellations in the Reichstag are not mandatory on the chancellor and his subordinates. An interpellation must be signed by at least 30 members and when it is reached on the order of the day the president of the Reichstag asks the chancellor "whether and when" he will answer. If the reply is affirmative, the interpellator delivers a speech and a reply is given, with a debate following, if 50 members so desire. No motion on the subject of the interpellation was permissible until 1913. Motions on any subject can, however, be tabled if signed by 15 members, and votes taken after debate. Knowledge of the facts that a motion carried has value only as an academic expression of opinion and that neither the chancellor nor his representative will attend or take part in critical debates invariably checks criticism.

It may be ventured that the constitution of the German Empire was not struck off for itself, but rather was drawn up to conform to the constitution of Prussia and to leave Prussia's power intact [1]). Many idio-

[1]) The constitution of Prussia provides:

ART. 43. The person of the King is inviolable.

ART. 44. The King's Ministers are reponsible. All government acts

syncracies in it become logical when that is kept in mind. Only two changes affecting the conduct of foreign relations have taken place. One is the occasional functioning of the committee for foreign affairs of the Bundesrath within the last ten or dozen years. Another is an amendment of December 5, 1911, to the colonial law (Schützgebietgesetz) of July 25, 1900. The Bundesgebiet, or federal territory, is defined by Art. 1 of the constitution, which can be altered only by legislation. The colonies do not form part of the Bundesgebiet and it was found that the Franco-German conventions which both ceded and added territory did not require acceptance by the Reichstag. Dissatisfaction resulted and the government assented to an amendment to the colonial law worded as follows: "An imperial law is required for the acquisition and cession of a protectorate, or part of such. This provision does not apply to the question of the adjustment of frontiers," In practical effect this provision makes an addition to the list of treaty subjects requiring legislation listed in Art. 4 of the Constitution [1]).

(documentary) of the King require for their validity the approval of a Minister, who thereby assumes responsibility for them.

ART. 45. The King alone is invested with executive power. He appoints and dismisses Ministers. He orders the promulgation of laws, and issues the necessary ordinances for their execution.

ART. 48. The King has the right to declare war and make peace, and to conclude other treaties with foreign governments. The latter require for their validity the assent of the Chambers in so far as they are commercial treaties or impose burdens on the State, or obligations on its individual subjects.

[1]) The colonial law amendment is of particular interest at present because the Reichstag would have to assent to any cession of colonial territory as a result of the war. It is interesting to note that Alsace-

The treaties subject to approval by the Reichstag are more numerous than those in almost any other European state. The provision in this respect is Art. 4 of the Constitution, concerning which Art. 11 stipulates:

So far as treaties with foreign countries refer to matters which, according to Art. 4, belong to the domain of imperial legislation, the consent of the Federal Council shall be required for their ratification, and the approval of the Reichstag shall be necessary to their validity.

The emperor has been somewhat restricted since 1908 as a prime factor in matters of foreign policy. On October 28 of that year a former diplomat published in the Londen Daily Telegraph an authorized conversation with the Kaiser. It was a very frank protestation of friendliness toward Great Britian backed up with what were evidently considered justificatory revelations and an elaborate assertion of Germany's foreign policy. It emphasized the Kaiser's goodwill despite an adverse opinion among some of his subjects. As a calculated indiscretion it created a furore, and at home a peremptory demand that the emperor should recognize that it was his business to be seen rather than heard. Subsequent occurrence were interesting and significant.

The *North German Gazette* [1]) published an official statement that the Emperor had permitted the publication of the interview without the knowledge of those responsible for the policy of the Empire. The manus-

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Lorraine and Heligoland are neither included in the constitutional Bundesgebiet nor within the definition of protectorate.

[1]) London *Times*, Weekly Edition, November 20, 1908, p. 739.

cript was sent to the chancellor who referred it to the Foreign Office with instructions to submit it to the most careful examination. As no objections were raised in the report of the Foreign Office, the article was published. When the chancellor became acquainted with the article, he informed the emperor that he had not himself read the draft. He considered himself responsible for its publication, and tendered his resignation, which was refused. To Reuter's news agency it was stated that the Foreign Office had assumed that publication had already been decided on and that all that was required was to confirm the historical accuracy of the facts.

The Reichstag convened on November 4. Interpellations were introduced at the opening session by representatives of the National Liberal, the German Freethinking People's, the Social Democratic, the Conservative and the Imperial parties [1]). As each interpellation required 30 signatures, 150 members, or more than

[1]) The texts of the interpellations are published in Verhandlungen des Reichstags, XII. Legistaturperiode, I. Session. Band 248; Anlagen zu den Stenographischen Berichten, No. 986*bis* 1021.

The wording of the texts so aptly reflects the attitude of the interpellators that I append transcripts of the exact language:

Bassermann, National Liberal, (No. 1003, op. cit. p. 5694):

Ist der Herr Reichskanzler bereit für die Veröffentlichung einer Reihe von Gesprächen Seiner Majestät des Kaisers im „Daily Telegraph" und für die in denselben mitgeteilten Tatsachen die verfassungsmässige Verantwortung zu übernehmen?

Ablass, deutsche freisinnige Volkspartei (No. 1006, op. cit., p. 5694): Durch die Veröffentlichung von Ausserungen des Deutschen Kaisers im „Daily Telegraph" und durch die vom Reichskanzler veranlasste Mitteilung des Sachverhalts in der „norddeutschen Allgemeinen Zeitung" sind Tatsachen bekannt geworden, die schwere Mängel in der Behandlung auswärtiger Angelegenheiten bekunden und geeignet sind, auf die

a third of the total, went on record as desiring an explanation and reform. Moreover, they represented all sections of the Reichstag. Needless to say the chancellor assented to make a statement. On November 10 the interpellators and Prince Bülow occupied the session. The chancellor made a critical defense of the emperor's published statement and announced that thereafter the Kaiser would not speak without consultation. He used this language:

The knowledge that the publication of his conversations has not produced the effect which the emperor intended in England, and has evoked deep excitement and painful regret in our own country, will — and this is a firm conviction which I have gained during these days of stress — induce the emperor in future to observe that reserve, even in private conversations, which is equally indispensable in the interest of a uniform policy and for the authority of the Crown. Were that not so, neither I nor any successor of mine could assume the responsibility[1]).

Beziehungen des Deutschen Reiches zu anderen Mächten ungünstig einzuwirken.

Was gedenkt der Herr Reichskanzler zu tun, um Abhilfe zu schaffen und die ihm durch die Verfassung des Deutschen Reiches zugewiesene Verantwortlichkeit im vollen Umfange zur Geltung zu bringen?

Albrecht, Sozialdemokrat, (No. 1007, *op. cit.*, p. 5695):

Was gedenkt der Herr Reichskanzler zu tun, um Vorgänge zu verhindern, wie sie durch die Mitteilungen des „Daily Telegraph" über Handlungen und Äusserungen des Deutschen Kaisers bekannt geworden sind?

Normann, Konservative (No. 1011, *op. cit.*, p. 5696): Ist der Herr Reichskanzler bereit, nähere Anskunft zu geben über die Umstände, die zur Veröffentlichung von Gesprächen Seiner Majestät des Kaisers in der englischen Presse geführt haben?

Von Hatzfeldt, von Camp-Massaunen, Reichspartei (No. 1016, *op. cit*, p. 5701): Ist der Herr Reichskanzler gewillt, Vorsorge zu treffen, dass sich ähnliche Vorkommnisse, wie sie durch die Veröffentliching des „Daily Telegraph" zu Tage getreten sind, nicht wiederholen?

[1]) The full reports are in Verhandlungen des Reichstags, XII. Legislaturperiode. I. Session. Band 233; Stenographische Berichte, 153, Sit-

A week later the chancellor had an interview with the emperor at Potsdam. The *communiqué* issued concerning it summarized the discussion and added textually [1]:

His Majesty the emperor accordingly approved the statements of the imperial chancellor in the Reichstag and gave Prince Bülow the assurance of his continued confidence.

Two subsequent motions in the Reichstag aimed at securing the responsibility of the chancellor to the Reichstag. One was introduced by the Social Democrats and the other by the center party. Neither was successful.

It is obvious from this slight sketch of the executive type of the conduct of foreign relations in the German Empire that many hostages have been given to popular or individual state control.

III. In Great Britain the conduct of foreign relations is vested in the crown, a term which is certainly not synonymous with the king as a person. The minister, however, assumes responsibility for the acts of the crown, and as a matter of practice the minister acts in the

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zung –181. Sitzung 5373—5405. The original of the passage quoted is at page 5396 C. and reads:

Die Einsicht, dass die Veröffentlichung dieser Gespräche in England die von Seiner Majestät dem Kaiser gewollte Wirkung nicht hervorgerufen, in unserem Lande aber tiefe Erregung und schmerzliches Bedauern verursacht hat, wird—diese feste Ueberzeugung habe ich in diesen schweren Tagen gewonnen — Seine Majestät den Kaiser dahin führen, fernerhin auch in Privatgesprächen jene zurückhaltung zu beobachten, die im Interesse einer einheitlichen Politik und für die Autorität der Krone gleich unentbehrlich ist. Wäre dem nicht so, so könnte weder ich noch einer meiner Nachfolger die Verantwortung tragen.

[1]) London Times, Weekly Edition, November 20, 1908, p. 739.

name of the crown rather than as the agent of the king. Though the king is theoretically capable of concluding treaties himself, no treaty is valid without the imprint of the great seal, which is in the custody of the chancellor. When William III was determined to conclude the first partition treaty personally and in secret he could not proceed until Lord Somers placed the great seal to blank powers. All treaties since 1700 with that exception have been and are negotiated by plenipotentiaries of the foreign office and so are as responsibly concluded as any acts of the executive cabinet. Maitland [1]) citing the legal decision of Walker vs. Baird (L. R. A. C. (1892), 491), is of the opinion "That a treaty made by the king has in general no legal effect whatever". In dealing with a monarchial country, however, it is well to bear in mind that the personality of the monarch and the social prerogatives at his disposal may play a part in the conduct of governmental affairs. Either, if deftly employed, will give royalty a great influence and may even serve to accomplish purposes not in strict accord with the text of formal laws. Something of this kind may come about from the personal influence of a monarch on the members of a cabinet, who will ordinarily be susceptible to the ideas or the rewards of the sovereign. Not all monarchs are disposed to wield such influence, which in these days is likely to aim at realizing popular aspirations or at least what royalty conceives to be the country's good.

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[1]) Constitutional-History of England, 424.

The cabinet since the reign of William III has been a responsible executive body depending for its tenure upon maintaining a majority in Parliament. Its control over treaties is therefore responsible in form, and its practice regarding the negotiation of such instruments has been more and more careful. As an illustration of the practice I quote the words of a lord high chancellor of a period before Parliament was firmly fixed as the sovereign power in the state.

Speaking of the conclusion of the treaty of Breda, the Earl of Clarendon said in his trial for treason:

Every dispatch from the ambassadors (was) read and debated at the council board; and when such difficulties did arise that the ambassadors would not take upon them to make any conclusion...., one of themselves.... gave his majesty a full account, before the council board, of all that had passed in the treaty. ....Every particular article was at large debated at the board, which took up many days.... To conclude, after a long debate for so many days upon every particular, the king resolved, with the concurrence of the whole board (one or two persons only excepted) to consent to the peace [1].

Respecting the conduct of foreign relations in general, and particularly in determining policy and the reaching of diplomatic decisions, the crown is likely to intervene. Queen Victoria and, in his lifetime, the Prince Consort took a keen interest in external relations, frequently for the best. In 1850 the queen's desires in the matter were definitely stated in the following note to her prime minister, Lord John Russell:

The Queen requires, first, that Lord Palmerston will distinctly state what he proposes in a given case, in order that the Queen may know as distinctly to what she is giving her royal sanction. Secondly, having

[1]) T. B. Howell, A Complete Collection of State Trials, VI, 502—503.

once given her sanction to a measure, that it be not arbitrarily altered or modified by the minister. Such an act she must consider as failing in sincerity toward the Crown, and justly to be visited by the exercise of her constitutional right of dismissing that minister. She expects to be kept informed of what passes between him and the foreign ministers before important decisions are taken, based upon that intercourse; to receive the foreign dispatches in good time; and to have the drafts for her approval sent to her in sufficient time to make herself acquainted with their contents before they must be sent off [1]).

The very next year the point came to trial. After the *coup d'état* of December 2, 1851, by which Louis Napoleon seized the reigns of government at Paris, the British cabinet decided that nothing should be done by her ambassaor at Paris which could wear the appearance of an interference of any kind in the internal affairs of France". Lord Palmerston, the foreign secretary, however, expressed to M. Walewski, the French ambassador, his "entire approbation of the act of the President, and that he could not have done otherwise than he had done". Lord John Russell asked for explanations.

The question at issue was whether the secretary of state was entitled, on his own authority, to write a dispatch as the organ of the Queen's Government, in which his colleagues had never concurred, and to which the Queen had never given her royal sanction. It was decided in the negative by requiring Lord Palmerston to give up the seals of the Foreign Office [2]).

The incident reveals the solidarity of the cabinet as the executive of the government in the name of the

[1]) Hansard's Parliamentary Debates, Third Series, Vol. CXIX, 90.

[2]) Hansard's Parliamentary Debates, Third Series, Vol. CXIX, 92—103.

crown. The usual practice was stated by Lord John Russell: "According to the uniform practice of the foreign office, the dispatches which I wrote were submitted to him (Lord Palmerston) as prime minister; frequently he would write the whole dispatch over again, and I was always ready to accept his draft [1]". That this is the current practice is shown by a remark of Sir Edward Grey in a speech at North Sunderland January 20, 1912:

> A considerable amount of fault [illegible] and with what some people think is and what they call my [illegible] policy, but which, of course, ought not to be called my foreign policy because it is quite impossible for any individual foreign minister to carry out a policy which is not also, in its main lines, the policy of the cabinet of which he is a member [2].

Parliamentary intervention in foreign affairs occurs on the occasion of the foreign office vote and through interpellations, which during Sir Edward Grey's tenure of office have been answered personally by him two days a week and at other times by an undersecretary. The foreign office vote has usually not resulted in a very keen or statesmanlike debate. Sir Edward Grey speaking in Parliament apparently assigned the reason when he said [3]:

> The real reason for lack of control, whether with regard to foreign policy or general policy or any great imperial matter, is the congestion of business in the House of Commons.
>
> .... As long as the House of Commons remains without some great

[1]) Hansard's Parliamentary Debates, Third Series, Vol. CCVI, 1833 cf. Vol. CXIX, 105.

[2]) London Times, Weekly Edition, Jan. 26. 1912, page 71.

[3]) Parliamentary Debates, Fifth series, XXIV, 540.

measure of devolution, its business will be so congested that, with the best will in the world, they would never be able to acquire that control of imperial policy which it can only acquire by frequent debates on important subjects.

It may be mentioned in proof that in the period 1801—10 foreign relations occupied 26. 75 per cent of the Common debates, whereas in the period 1881—90 they occupied but 11. 75 per cent of the time [1]. Clearly any reform must be accomplished by Parliament.

Recent criticism has harped on the same strings and has reverted to Henry Richard's motion of March 19, 1886, which was then lost by four votes and which read:

That in the opinion of this House, it is not just or expedient to embark in war, contract engagements involving grave responsibilities for the nation, and add territories to the Empire without the knowledge and consent of Parliament [2].

Of this motion it may be said that it progresses in a circle. No cabinet can embark in war without a vote of funds from Parliament, and it is therefore certain that no cabinet will fail to feel full responsibility for action tending toward war. In the debate on the motion Mr. Gladstone as prime minister asserted:

I am not sure that any instance could be quoted in which the Queen has engaged in war in any technical sense without the consent of Parliament [3].

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[1]) Thomas Alfred Spalding, FEDERATION AND EMPIRE, 79. (London: H. Henry & Co. 1896).

[2]) Hansard's Parliamentary Debates, Third Series, Vol. CCCIII, 1386—1421, The motion was lost 108 to 104.

[3]) Hansard's Parliamentary Debates, Third Series, Vol. CCCIII 1404.

The statement is probably extravagant in the unqualified terms which the prime minister chose to use, but to one sort of war, a kind obsolete in these days of national conflicts, it certainly does apply, because Section III of the Act of Settlement adds a definite constitutional restriction:

That in case the Crown and Imperial Dignity of this Realm shall hereafter come to any Person not being a native of this Kingdom of Engeland, this Nation be not obliged to engage in any War for the Defence of any Dominions or Territories which do not belong to the Crown of England without the consent of Parliament [1]).

As to contracting engagements without the knowledge and consent of Parliament, there is no lightheartedness concerning them as is commonly charged. If as a minister of the crown, he should forget his responsibility, the chief of the foreign office should turn back to the articles of inpeachment in 1667 against Edward Earl of Clarendon, which state [2]):

XVI. That he hath deluded his majesty and the nation, in all foreign treaties and negotiations relating to the late war.

Lord Derby, then Lord Stanley and foreign minister, speaking in 1867 in reply to a complaint that Parliament could only discuss a treaty while the country was pledged by its obligations, said: "All I can say is, that is the constitution under which we live; the power of making treaties is vested in the executive upon their responsibility. If I may judge from my own feelings, so

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1) 12 and 13 Will. III, cap. 2, 1701.

2) T. B. Howell, A Complete Collection of State Trials, VI, 397.

far from trying to strain that responsibility, a minister will always desire to be supported by the knowledge that the opionion of the House is in his favor [1])".

The addition of territories to the empire [2]) without the knowledge or consent of Parliament raises an exceedingly complicated question as to the relations of the crown and the numerous types of nonsovereign portions of the empire. "As a general rule", says Sir Henry Jenkyns [3]), "the British dominions cannot be added to or diminished without the consent of the crown.... As in most other constitutional questions, the modern tendency is to consider that the crown could not do so important an act (as surrendering British territory) without the consent of Parliament [4]), Where an imperial (Parliamentary) act has expressly defined the boundaries of a colony or has bestowed a constitution on a colony within certain boundaries, territory cannot be annexed to that colony so as to be completely fused with it.... without statutory authority; because (a) any such annexation would be altering an act of Parliament; and (b) colonial legislation cannot operate beyond the colony, and therefore cannot extend to the new territory until it is by some means made part of the colony. But the king, unless restrain-

[1]) Hansard's Parliamentary Debates, Third Series, Vol. CLXXXVII 1916.

[2]) The question of foreign office alteration of the territory of the British Isles proper has never arisen.

[3]) British Rule and Jurisdiction Beyond the Seas, 2—4.

[4]) Sir Henry, who as Parliamentary counsel from 1869 to 1899 was the official draftsman of legislation, here cites the debates on the cession of Heligoland and the Anglo-German Agreement Act, 1890 (53 & 54 Vict. c. 20) as a precedent.

ed by an imperial act, can give to any such colony... the administration and government of any territory... The same law appears to apply where the boundaries .... of a colony are altered by diminution.... Irregular annexations have been validated by Parliament [1]). In 1895 a general act (58 & 59 Vict. c. 34) was passed enabling the crown, by order in council or letters patent, to alter the boundaries of any colony, but this power was limited in the case of the selfgoverning colonies by requiring the consent of the colony". It is therefore true that the foreign office, in negotiating alterations of territory, acts usually on the initiative and as the agent of the nonsovereign entity concerned.

"This is a power", said Mr. Gladstone", which, in the abstract, is greater than it is in practice.... The difficulty arises in consequence of the political considerations which have grown, not out of the mere act of annexation.... but on account of the liberty which has been assumed by the executive government in political and warlike proceedings antecedent to the annexation [2])".

It can be seen from what has been said that Great Britain, while possessing ostensibly an executive form of the conduct of foreign relations, in reality has a form of such conduct that is responsible indirectly but actually to the legislative body. The difficulty encoun-

[1]) See Jenkyns' note for citations of acts respecting New South Wales, Victoria and Canada.

[2]) Hansard's Parliamentary Debates, Third Series, Vol. CCCIII, 1402.

tered in examining the British method of government lies in the fact that it has grown from practical conditions and has never been made as a whole to conform to political scientific theory of any kind. The process is seen for our purpose in the development of the cabinet, now in practice depending as respects tenure upon a parliamentary majority, from the privy council, which was and in theory still is a body of executive councillors chosen at will by the crown.

At present no policy of far-reaching consequence is likely to be adopted without the knowledge and implied consent of the House of Commons. Responding to President Taft's proposal of unlimited arbitration, Sir Edward Grey in a speech before the House on March 13, 1911, said:

> When agreement of that kind, so sweeping as it is, is proposed to us, we shall be delighted to have such a proposal. But I should feel it was something so momentous and far-reaching in its possible consequence that it would require, not only the signature of both governments, but the deliberate and decided sanction of Parliament, and that, I believe, would be obtained.

The treaty project when prepared was laid before Parliament, but it was not in terms a proposal for unlimited arbitration. It was a combination of technical devices for the pacific settlement of all disputes. That Parliament accepted the proposal in principle need not be doubted in view of the numerous questions and speeches concerning it, though no vote was taken. The question of ratification never arose because, owing to restrictions put upon the treaty text by the United States Senate, the President did not push his policy to completion.

The declaration of war in 1914 was another instance of a similar character. Statements by both the secretary of state for foreign affairs and the prime minister were made to Parliament before the act, and these were notably accurate, as a textual comparison with the entire set of diplomatic documents published subsequently will indicate. Sir Edward Grey closed by saying: ".... If.... we are forced.... to take our stand upon those issues, then I believe, when the country realizes what is at stake, what the real issues are, ... we shall be supported throughout, not only by the House of Commons, but by the determination, the resolution, the courage and the endurance of the whole country". No opposition was voiced. The leader of the party out of power, Bonar Law, assured the government that "they can rely on the unhesitating support of the opposition". The Irish leader reiterated the same sentiment. Many speakers voiced hopes that the government would not push toward war and find a way to maintain peace, but these members all seemed to agree with one of their number, Ramsay Macdonald, who referred to "a House which in a great majority is with him (Sir Edward Grey)". And the essence of parliamentary government is that a majority takes decisions and gives mandates. The next day (August 4), the prime minister announced the circumstances and the fact of the ultimatum, again without opposition [1]). It is interesting to recall that the prime minister had

[1]) Parliamentary Debates, Fifth Series, Vol. LXV. The discussion on August 3 is in columns 1827—1853; on August 4, 1925—7; on August 5, 1963—4.

forecasted such an attitude. On March 24, 1913, in reply to questions by Sir William Byles and Joseph King in Parliament, Mr. Asquith said: "There are no unpublished agreements which will restrict or hamper the freedom of the Government or of Parliament to decide whether or not Great Britain should participate in a war. The use that would be made of the naval and military forces if the Government and Parliament decided to take part in a war is, for obvious reasons, not a matter about which public statements can be made beforehand [1])".

Evidence to the same general purport as that here adduced might be cited *ad libitum*. The fact is that Great Britain has a government which as to its forms centers about the crown, but as to all its practice centers about the House of Commons. "Whoever should today study legal texts only", says James Bryce [2]), "might conclude that the crown and the House of Lords are just as important members of the composite sovereign as is the House of Commons." It is fair to conclude that, by the ordinary processes of legislation, the House of Commons can at present make any changes in the conduct of foreign relations that it desires.

c. The American type of handling foreign relations may be illustrated by the practice of the United States, which at least has been the inspiration of the type

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1) Parliamentary Debates, Fifth Series, Vol. L, 1317; cf. Mr. Gladstone's statement in 1886, above. The „premiers word's above, it will be noted, do not refer to „understandings".

2) Studies in History and Jurisprudence, 553.

throughout the majority of the states of the world. It is that type which fundamentally makes the legislative branch of the government part of the treaty-making power and recognizes a right on its part to be informed and even to direct action on foreign relations.

So far as I am aware, this type first came into use in the United States, where it was an outgrowth of conditions rather than a definitely thought-out plan. When the Declaration of Independence of July 4, 1776, canceled the control of English officials in the British colonies they were confronted by the problem of setting up a government to fight the war that was already upon them. The immediate thing was to co-operate in war, and the Continental Congress resulted. It began work under almost the same conditions, that a modern diplomatic conference would sit if its members had a right to vote always with representative authority. It was both the executive and legislative power in the state. The Continental Congress, as the only body with power, soon found it necessary to handle foreign affairs, for the American Revolution, like all wars, was won quite as much by diplomacy as by the sword.

The Continental Congress met at Philadelphia on September 5, 1774, adopting soon after a loyal address to the King of England asking him to recall oppressive measures. This address was sent to certain "friends of American liberty" in England who were instructed to act for the "United Colonies". Three out of the seven addressed did so, and thus the first diplomatic act of the democracy was one initiated by legislative repre-

sentatives. The effort failed and events headed toward rebellion. On November 29, 1775, a Committee of Secret Correspondence was appointed by Congress "for the sole purpose of corresponding with our friends in Great Britain, Ireland and other parts of the world, and that they lay their correspondence before Congress when directed" [1]). Benjamin Franklin was its chairman. After the Declaration of Independence its secret character was less necessary and on April 17, 1777, it was succeeded by the Committee for Foreign Affairs, created by the Congress. The Articles of Confederation adopted in November, 1777, continued the arrangement, which proved unsatisfactory. A plan for a department of foreign affairs was reported to the Congress in January, 1781, and on August 10, 1781, such a department was organized without the right of taking independent action. Robert R. Livingston, the first head of the department, was not an executive officer, but rather a clerk for Congress. He was not entrusted with the initiation of diplomatic matters, did not send papers of importance before submitting them to Congress, submitted to it all correspondence from abroad, and simply executed resolutions of the Congress directing the foreign policy. The Congress even held frequent interviews with the minister of France and more or less committed the Confederation.

The system was apparently a legislative, but really

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[1]) Francis Wharton, Revolutionary Diplomatic Correspondence of the United States, II, 61.

an executive control of foreign relations [1]). It is therefore significant that it failed. It was never perfect, for the mission in France was invested with almost unlimited power by the Congress [2]). In fact, it might be said that the Congress as a legislature made of its executive secretary for foreign affairs a mere clerk and placed few limits on the power of its diplomatic officers [3]). There was throughout the period a rivalry of ideas between those who held for observance of the rules of international law and those who desired to disregard them. Yet „no matter how much Congress might arrogate to itself supreme power, executive authority grew up as co-ordinate with legislative. The first form in which this executive authority asserted itself was in that of our legation at Paris" [4]).

"Nor did this growth of executive co-ordinateness exhibit itself exclusively in foreign relations. It was so in finance, over which, after the incapacity of committees for financial work had been demonstrated by many disasters, Morris was granted a control which each day became more and more closely assimilated to that exercised by the executive department of the government at the present day. It was so in military affairs, in which Washington gradually assumed the

[1]) Similar organization has frequently appeared when a nascent state has developed only its sovereign assembly.

[2]) See additional instructions to Benjamin Franklin, Silas Deane and Arthur Lee, commissioners from the United States of America to the king of France, Revolutionary Diplomatic Correspondence, II, 172.

[3]) On the whole subject of government of foreign affairs by committees of Congress see Wharton, Revolutionary Diplomatic Correspondence, Introduction, secs. 15, 103, 104, 180, 209.

[4]) Wharton, *op. cit.* I, 251.

position which the executive now exercises in such affairs. Thus it was that even Congress itself, which had at first been the sole organ of government, accepted, under force of circumstances, the establishment, in response to Washington's appeal of January 29, 1781, of executives or ministers in the departments of finances, war, the marine, and foreign affairs. The Constitution of the United States did not make this distribution of power. It would be more proper to say this distribution of power made the Constitution of the United States" [1]).

The Constitution which inaugurated a federal system took form under the influence of this preceding practice and of the philosophical arguments for the separation of powers of Montesquieu and Blackstone. Legislative intervention in the conclusion of treaties resulted from the detailed character of the government, that is, its federal character. By Art. 6 of the Articles of Confederation of July 9, 1778, the states had been by implication prohibited from conducting foreign relations "with any king, prince or state" or between themselves without the consent of the Congress, while by Art. 9, paragraph 1, foreign relations were placed within the sole and exclusive right of Congress, subject to the assent of nine of the 13 states. The fundamental problem was to combine a number of sovereign states into a workable system, and to accomplish this result in the face of a pronounced particularism in the states. The tenth amend-

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[1]) Wharton, *op. cit.*, I, 662—3.

ment, declared in force December 15, 1791, states the principle which presided over the birth of the Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people". No consideration seems to have been given to foreign relations other than treaties in the federal convention. Pinckney's plan contemplated that "the Senate shall have the sole and exclusive power to declare war and to make treaties and to appoint ambassadors and other ministers to foreign nations, and judges of the Supreme Court [1])." Hamilton's, on the other hand, provided:

> ART. III. 8. The Senate shall exclusively possess the power of declaring war. No Treaty shall be made without their advice and consent.... [2])

In an earlier draft was this provision:

> The authorities and functions of the Executive to be as follows:.... to have with the advice and approbation of the Senate, the power of making all treaties [3]).

These ideas were embodied into Art. II, sec. 2, second paragraph, of the Constitution, which reads: "He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate and, by and with the advice

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[1]) Farrand, Records of the Federal Convention, III, 599.
[2]) Farrand, *op. cit.*, III, 622.
[3]) Farrand, *op. cit.*, I, 292.

and consent of the Senate, shall appoint ambassadors, other public ministers and consuls."

No other reference to the conduct of foreign relations is to be found in the Constitution. An act of July 27, 1789, created a Department of Foreign Affairs, which was renamed the Department of State by act of September 15, 1789. Its functions were and are correspondence with and instructions to diplomatic and consular agents abroad and negotiations with the agents of foreign nations in the United States, "or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department" [1]).

The American type of the conduct of foreign relations, therefore, centers the business in the executive, with the exception of all treaties. The explanation is that treaties are, by the Constitution, laws and that the state itself is a federation. The President and two-thirds of the senators present, therefore, exercise a legislative power in passing a treaty to be the law of the land, while the senate alone is selected to perform this function because they thus make treaties

[1]) The law shows internal evidence of being largely based on a persistent project in the constitutional convention to provide for a cabinet in the fundamental document. The project as given in the journal of August 20, 1787, reads:

„To assist the President in conducting the Public affairs there shall be a Council of State composed of the following Officers:

„4. The Secretary of foreign affairs who shall be appointed by the President during pleasure — It shall be his duty to correspond with all foreign Ministers, prepare plans of Treaties, and consider such as may be transmitted from abroad — and generally to attend to the Interests of the United States, in their connections with foreign Powers." (Farrand, *op. cits.*, II, 335—6).

binding upon the several states, whose representatives are their two senators each. A suspicion that the executive might be capable of acquiring undue power lay behind the division of the treaty-making power [1]). It is somewhat remarkable that the suspicion did not extend to the elaboration of foreign policy, but calling for papers, power of impeachment and reservation to Congress of the rights to declare war seemed, and were, safeguards in that respect.

The American system, owing to the success of the United States, has been widely copied. It is logical only in a federal state and therefore only in Switzerland, Mexico, Venezuela, Colombia, Brazil and Argentina. Elsewhere its adoption has been due either to imitation or to the developing idea of legislative as the sole democratic control. In Latin America, and necessarily in the case of unicameral legislatures, approval of treaties is usually by the Congress as a whole.

This American type of the conduct of foreign relations operates with no more perfection than the others, but it has several distinctive features not present in the others. For instance, it abolishes secret treaties [2]); but it encourages hair-splitting on the technical definition of a treaty within the meaning of the constitution, and results in executive engagements through exchanges of notes and other subterfuges.

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[1]) The attitude of the constitutional convention toward the executive is illustrated by the definition of Mr. Wilson (Farrand, *op. cit.* I, 70): „An executive ought to possess the powers of secrecy, vigor and dispatch — and to be so constituted as to be responsible."

[2]) True only if the executive and legislative departments do not themselves agree to preserve secrecy.

States possessing it publish their annual diplomatic correspondence as a whole, barring those parts affecting or reflecting on the interests of third states not parties to the negotiations. In the legislative department of the government there is usually a restricted committee the members of which are more fully informed than their colleagues; and the legislative department as a whole comes to depend on their judgment, voting their recommendations as a rule. The function of the legislature tend to become perfunctory and the attitude of the committee tends to coincide with that of the executive.

Secrecy in Foreign Relations. Perhaps the majority of the criticism connected with the conduct of foreign relations aims at what is inaptly called "secret diplomacy". The exact limits of the phrase seem nowhere to be defined, and the critics collectively make so many concessions in favor of secrecy that not much but an ill-natured indictment remains when the charges are completed. The bulk of the discussion has not recognized that any legally constituted authority in a state, by the very fact of such legal establishment, performs public functions responsibly, so that a certain burden of proof exists in its favor and against those who charge misuse of power. To picture conductors of foreign relations as mere intriguants, triflers with the fate of the state, gamblers with national destiny is to misjudge profoundly the real incentives to action and to deny to a body of men more than ordinarily desirous of honor by their fellows the instinct for being well-regarded.

The truth is that the conductors of foreign relations

exhibit an almost uncanny prescience in judging events and acting as the agents of the state. The instances in which they have been repudiated by the people they represent are few. Of course, I do not claim that such success in interpretation gives a moral bill of health. The normal attitude that a public man takes is that of satisfying the majority even though the minority may be more right. The conductor of foreign affairs is trebly bound: (1) he must anticipate what the bulk of his countrymen will expect in a given case; (2) he must frequently obey the teachings of experience in the face of public opinion; and (3) he must seek to satisfy both these demands when encountering a similar resultant of forces to which his antagonist pays heed. The accommodation of these conditions is in addition to any problems arising from the difficulties inherent the question at issue, which are very likely to be large.

The outstanding fault in the whole conduct of foreign relations is that the diplomatic agent is an advocate. When Sir Thomas Wotton made the famous pun about an ambassador being a man sent "to lie abroad for his country", he stated two facts then true. For then an envoy usually tried prevarication as the shortest road to a result, though lying has now gone out of fashion in foreign offices. The other fact remains true: an envoy is abroad for his country, and his principals at home are also "for the country." Both are expected to win victories. Though national politics may step at the water's edge, the diplomat is nevertheless expected to come home with his shield or on it.

It is only recently — within half a century — that there has been any general conception of a policy of fairness as something inuring to the good of the state in the long run; and that conception has neither been widely enough operative nor consistently enough followed to alter the dominant idea of the diplomat as an advocate.

As a consequence a certain amount of secrecy becomes of importance in negotiations, and more or less normal. A national public becomes a lever, useful for prying an opponent away from his stubborn resistance to the national desire. In studying the negotiations following the Agadir incident I acquired a clear idea of the operation of this method because a full file of newspaper dispatches and communiqué's was available for comparison with the official dispatches. The negotiations were conducted in secrecy, except for cause. The German Foreign Office frequently issued *ballons d'essai* the ideas of which, being supported by the press, were then pushed by the negotiator as something that the people demanded [1]). The French at Paris did the same thing.

There are excellent reasons for secrecy in the course of negotiations. Sir Edward Grey discussed the point in the British Parliament in 1912. He said:

There is a great deal in foreign affairs which cannot be disclosed. Secrecy there must be up to a certain point, because in foreign affairs we are dealing with the relations with other countries, with secrets which do not belong to us specially, but which we are sharing with

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[1]) Ministère des affaires étrangères. Documents diplomatiques. 1912. Affaires du Maroc VI. 1910—1912. Pages 421, 433, 441, 477.

some one or more foreign powers.... Very often at an early stage of negotiations to make a premature disclosure would result in the other power desiring to break off the negotiations altogether [1]).

But this is not the only reason for secrecy in negotiations. A negotiator is charged with securing a result, invariably of a complicated character, as even a cursory reading of diplomatic correspondence or of the treaty texts resulting will show. The great bulk of subjects dealt with is of a purely technical nature and interests the public about as much as the technique of actuarial methods would interest the insured individuals. Two reasons, then, become apparent for secret negotiation — the disturbance to smoothness of progress in the task and lack of public concern.

The legitimacy of guarding the progress of negotiation from disturbance arises from the fact that the executive negotiator as an authorized agent is sailing an uncharted sea. The mere circumstance that a matter requires negotiation indicates that it involves conditions other than law, the definite processes of which never should be secret. In a famous state document Elihu Root referred to negotiators as "effecting settlements of the questions brought before them in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents [2])." To make generally public the vicissitudes of intermediate stages of a negotiation conditioned on such various and varying circumstan-

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[1]) Parliamentary Debates, fifth series, Vol. XXIV, 540—541.

[2]) Instructions to delegates to Second Hague Conference, Foreign Relations of the United States, 1907, 1135.

ces is sheer impossibility. The result could only be confusion, and the expert would be only less confused than the amateur. Very few take the trouble to examine the records when they have become historical and are officially arranged with the apparatus of reference. Any one who does take that trouble and is willing to keep in mind that both sides have rights to guard and national points of view to further is as likely to respect the ability shown as to criticize the details of the task. And if one will compare such a complete record with contemporary press accounts, he will clearly realize how much out of perspective the latter are; not from dishonesty but simply the from incompleteness of the record.

The public lacks interest in the details of negotiations, which are necessarily of a technical character. The extent to which activities afoot in the foreign offices are reported in the press indicates even now — and the circumstance will increase — that the public is kept aware of the trend of events. The public does not care for more. It would serve no good purpose if they did and the desire was satisfied. Negotiations are delicate affairs, involving some interpretation of policy and invariably affecting national predilections. One must presume from the nature of all governments that the executive negotiator possesses a mandate to act in behalf of the state and is sufficiently human to seek honor and success rather than dishonor and failure. The strongest presumption therefore exists that the negotiator conducts his technical business in good faith and seeks to meet not only the wishes of

the political majority on which his tenure of office depends, but also tries to advance his country. Not to credit him with patriotism implies something like treason.

Turning to another phase of the subject, different conditions maintain respecting the historical publication of the documents of negotiation. By "historical" I mean to indicate publication after the fact. This may be done immediately after a negotiation is completed, at stated times, or long after the negotiations. Two methods are practiced.

The American method since 1861 has been based on the annual publication of a book now entitled "Papers relating to the Foreign Relations of the United States, with the Annual Message of the President transmitted to Congress..." In this book is printed the bulk of the diplomatic correspondence of the year with which it deals, arranged by countries and under them by subjects. It is carefully edited and, though not all documents are published, the impression made by them is honest and straightforward. Omitted from the book are: Domestic letters, by which term is understood correspondence originating within the state; large amount of correspondence relating to claims; a considerable amount of correspondence of an incidental or unimportant relation to the subject handled; and all correspondence with any state which refers to a third state's actions or policy in anything approaching a critical manner. The published columns average about 1000 octavo pages of 500 words each.

In addition, the American method comprises many

documents presented to Congress in response to resolutions calling for papers by either the House of Representatives or the Senate, chiefly the latter. To the Senate many papers are transmitted as "Executive Documents", emanating from the President and relating to business which constitutionally concerns the Senate. Other papers when called for are the subject of a resolution specifying what is desired, "if not incompatible with the public interest." House and Senate Documents are reported in the Congressional Record and are obtainable on request. Executive Documents are obtainable only after the injunction of secrecy is removed. For about ten years a tendency has been evident to withhold diplomatic correspondence from the public. The interval in publishing the volume of „Foreign Relations" extended to five years after its date year, and is now longer than that. Congress is frequently refused correspondence called for, notably respecting Mexico. During the European war, the Department of State has officially issued white books on phases of foreign relations connected with the conflict. These have a small and technical circulation, like all such publications. But the newspapers have been furnished with the text of some important or opinion-making documents, and these, being available to every one and generally read, have caused the convictions of the people to become definite. As such isolated documents do not give a fair impression of the whole subject with which they deal, they can scarcely be expected to invoke a public's instructed judgment.

A third feature of the American method is a recent tendency to obviate such secrecy as exists. Ordinarily the Senate advises and consents to treaties in secret executive session, but in 1912 the Taft arbitration treaties and in 1916 the canal treaty with Nicaragua were debated in open session[1]). These treaties and others have recently been published while action was pending. During the European war it has been a general practice of the government to give to the press the texts of important diplomatic correspondence, while the Department of State has issued officially white books with many additional documents.

These details of publication of documents exist in their essentials, *mutatis mutandis*, throughout Pan America, where the annual publications are called "Memorias" [2]) and are in the form of a report with justificatory documents attached.

The European method leaves much more of the files

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[1]) The first instance of debating a treaty in open session was apparently that of the Bayard-Chamberlain Fisheries treaty of February 10, 1888. The treaty practically ended the century-old North Atlantic fisheries controversy between Great Britain and the United States. Its discussion in open session of the Senate had infortunate results. It was made an issue in the presidential campaign of thal year and failed of ratification. That it did not deserve to be killed by publicity, or killed at all, can be seen from the fact that some of its most important provisions were embodied twenty-two years later in the award of the Permanent Court of The Hague in the North Atlantic Fisheries Arbitration.

Executive sessions of the Senate are not reported stenographically. A summary journal is kept and this is published in a small edition several years after the period with which its text deals. It usually shows amendments to treaties offered, votes thereon and the votes consenting to ratification in the customary „year-and-nay" form.

[2]) In Brazil they are called „Relatorios."

of the foreign office unprinted. The bulk of the diplomatic correspondence never sees the light, though privileges of examination by students are freely granted. The method is sufficiently indicated by the practice of Great Britain. Downing street as usually publishes folio white or blue books to the extent of some two volumes in the set of Parliamentary Papers. These papers make no attempt at presenting a conspectus of Foreign Office business, nor do similar publications in Europe. They do deal extensively with particular subjects, the dispatches being published verbatim and with great fullness. To give a comparison in methods, the Second Hague Conference may be cited. "Foreign Relations of the United States," 1907, contains correspondence up to the issuance of the instructions to the delegates, which are followed immediately by their report. The considerable amount of correspondence inevitable while the conference was in session is lacking. The similar British publication contains the dispatches reporting the progress of events, day-to-day instructions and the alterations of policy due to the vicissitudes of negotiation. Comparisons will usually show that British documentary publications are fuller than those of Pan America. The same is true of France and most other European ministries. Germany is an exception, the Wilhelmstrasse not being given to publishing dispatches *in extenso;* rather, when documents are required, a statement giving a running account of the appropriate subject matter is printed, and justificatory documents are annexed to this.

Published diplomatic correspondence in Europe is

laid before the legislative department, usually by request.

That a certain amount of editing is done goes without saying. Editing properly takes place respecting dispatches that involve personalities. A negotiation is afoot, and a diplomat writes to his chief that the minister with whom he deals is temperamentally a bargainer, and things will go smoother if the initial demands are stiffened to give this predilection free play. Or the minister is a very reasonable being, and it will be best to draft demands as nearly as possible to meet his wishes. A letter of the first tenor would, if published, destroy a diplomat's possibility of usefulness abroad; a letter of the second tenor would destroy confidence at home. The one would create antagonism in the minister, the other a suspicion of disloyalty to the cause of his country. Yet both types of letter are necessary in negotiation. Unless such letters are exchanged, negotiators and their own ministers cannot understand the conditions to be encountered. Editing of such comments out of published reports is advisable.

To a large extent the charge of official unfrankness in connection with such editing is avoided by the obvious method of discussing personalities and of reporting personal impressions either by word of mouth or in private letters. By general custom, it is understood that a minister of foreign affairs conducts correspondence of an unofficial character with diplomats abroad. This correspondence remains private, not usually finding its way to official files. Less formal in charac-

ter than official correspondence, it is an appropriate vehicle for relating the gossip requisite for judging personalia. Two instances of such correspondence may be given as illustrations, though they are numerous and occur everywhere in the reminiscences of diplomatic officers.

It will be recalled that the Hay-Pauncefote treaty of February 5, 1900, passed the Senate only with radical amendements, and that in the negotiations for another treaty during the next year the American Department of State sought to secure terms which would be acceptable to that body. "Foreign Relations", 1901, contains only the treaty text, but subsequent differences respecting Panama Canal tolls under this treaty of November 18, 1901, brought calls for correspondence. There were published as a result in April 23, 1914, many documents dealing with the negotiations. These included several "private personal letters, not of record [1]". They contain nothing which would have concealed anything improper in the slightest degree from the citizen and became useful in print solely because a question of interpretation had arisen which could not have been forecasted. Moreover, there was a good reason for omitting the correspondence from „Foreign Relations", 1901. The treaty itself textually put the government on record concerning what it had done and the correspondence concerning it was therefore properly deemed of slight importance at the time. In the publication of that year's activities

[1]) Diplomatic History of the Panama Canal, Sen. Doc. No. 474, 63rd Congress, 2nd Session, 21, 22, 36, 37, 51, 53.

the material on the treaty negotiations came into competition with the important and significant negotiations connected with the relief of the Peking legations from the Boxers. As between the two the Chinese correspondence was much the more useful to publish at the time.

The other instance is from the life of Sir Arthur Paget, the English diplomat accredited to Vienna from 1801 to 1806. In a dispatch of October 24, 1805, he dealt "as it was his duty to do [1])" with the manner in which the Austrians had conducted the campaign culminating in the capitulation of Ulm. Some of his comments were:

The first and principle fault which has been committed was to have taken the field with too small a force....

I cannot explain this strange distribution and mis-application of the forces but in the two following ways:

1. It is probable that General Mack, aware of the jealousy or perhaps the decided hatred borne him by the Archduke (Ferdinand), was unwilling to inflame that animosity by a proposal to withdraw from Italy any very considerable number of the troops.... placed under the command of his royal highnes.... To this false and misplaced delicacy therefore are in great measure owing the present misfortunes....

2. In settling the plan of the campaign, it must have been calculated that previous to the opening of it the Russians would have joined. This in truth, however false and extraordinary, was the calculation which was made....

Either the Austrians were in sufficient force to contend alone against the French, or they were not.

In the first hypothesis, why should the position of the Iller have been chosen, *never to be abandoned* (sic)? In the latter, why risk so forward a movement? etc. etc. [2]).

After Austerlitz the English Parliament called for

[1]) Sir Robert Adair, Mission to the Court of Vienna, 10, note.

[2]) The Paget Papers.... edited by Sir Augustus B. Paget, Vol. II, 224—225.

papers and Lord Mulgrave, Pitt's secretary for foreign affairs, allowed this dispatch to be published. On March 14, 1806, Charles James Fox, who had succeeded Lord Mulgrave, asked Sir Arthur's resignation in a private letter. He said in part:

I should.... have waited till I found an opportunity more agreeable to you, if the papers.... printed had not appeared to me to be of a nature to render your continuance at Vienna disagreeable to yourself and by no means conducive to the public serivce. The publication.... seems to me to have been as little necessary to the defense of our predecessors as it is certainly unfair and unjust toward you; but having been so published no alternative was left to me [1]....

The writer has used the modern diplomatic correspondence of most of the Pan American states, which publish their dispatches yearly, and that of Great Britain, France, Portugal, Germany, Austria-Hungary, Italy and Belgium, which publish correspondence on specific subjects occasionally. He has found the European publications generally fuller and more satisfactory for the subject dealt with. The exception is Germany, which does not print correspondence but a documented argument. But Great Britain is the only European state which can be said to publish correspondence regularly, and on the whole the regular publication of correspondence would seem to be the desideratum that should be aimed at. Mountague Bernard sums up the situation justly in these words:

The publication of despatches has its inconveniences; it closes many channels of information; it may often embarrass an envoy in his dealings with foreign ministers; it tends to encourage the base practice of

[1]) The Paget Papers, Vol. II, 272.

writing despatches, not for the persons to whom they are addressed; but for the public by which they will be read. Rigidly enforced, it would prohibit all confidential reports and close the door to all confidential reports and close the door to all confidential intercourse. Yet, with all its inconveniences, broad daylight is, I am persuaded, the most effectual check on those faults to which in the field of foreign policy Governments and their agents have been prone. Base motives and crooked designs shrink from it; falsehood and dissimulation spin their webs in dark corners; that political wisdom which so often overshoots its mark loves to scheme and calculate in the shade. But the great interests of nations thrive best in it. It animates public spirit, and invigorates the sense of duty [1]).

The third set of considerations respecting secrecy in foreign relations relates to secret treaties. No subject connected with foreign relations has recently received more attention. In my deliberate opinion most of the criticism in misplaced and most of the so-called advantages of secret treaties misunderstood. On this subject Bernard, usually so keen an analyst, makes only a very obvious remark:

Secret treaties, and still more secret articles anexed to published treaties, are in the nature of lies; for a treaty is essentially a public engagement, and to publish a part as the whole keeping the remainder undisclosed, is to palm off an imposition upon Europe. And yet the arguments for truth and openness in international affairs are plain and irresistible. Without them there can be no confidence, and on the confidence which a diplomatist inspires his whole success depends. Macchiavel saw this. In his letter of advice to Raffaello Girolami, Florentine envoy to the court of Charles V, he insists strongly, from its own ob-

[1]) Four Lectures on Subjects Connected with Diplomacy, 160—161 Bernard, who was one of the British negotiators of the famous treaty of Washington of May 8, 1871, for settlement of the Alabama claims, was of course not contemplating such a frenzy of conducting negotiations in the newspapers as has characterized the diplomacy of the European war. It may be doubted whether the practice in the presence of belligerency will set a precedent, for it is inspired by a spirit of propaganda which cannot be considered a normal characteristic of negotiation.

servation and experience, in the importance of gaining a character for sincerity [1]).

Secret treaties or articles are out of fashion. The reason is not their dishonesty but their inefficiency. There are no secret treaties. The most that can be said of those whose text is unpublished is that their text is not generally known. In the nature of the thing there can be no secret treaty, for such a document is without reason for being unless directly of implicitly aimed at a third party; and that party has exactly the same interest in discovering the plot as the plotters have in making it. It is beyond the bounds of human possibility to keep a plot heinous enough not to bear the light of day from evidencing itself. But, once there is evidence of the existence of the plot, its terms, or at least its bounds, will become known to the interested third party from many sources. The intended victim finds his protagonists acting irrationally or under reserve in certain fields of their relations, and draws the obvious conclusion that they are so acting for cause. Knowing his relations with them as well as they know their relations with him, he is equipped to localize the plot, and it is then little more than a matter of detection to orientate the whole thing. Little by little the evidence is built up and finally the whole thing can be reconstructed with the substantial accuracy with which the scientist reproduces the prehistoric animal from the fossil remains of a few bones.

At that stage the so-called secret treaty can scarce-

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[1]) Four Lectures on Subjects Connected with Diplomacy, 126—127.

ly be said to be secret. At best it is only semi-secret. To make the point clearer, it may be well to illustrate the process outlined. The Franco-Russian alliance of 1891—1894 was announced as a secret treaty, so that the preliminary and evidential ratiocination was unnecessary. But it was entirely obvious that it was directed against the Triple Alliance, and that in itself indicated both negatively and positively its restrictions. The chiefs of the allied states exchanged visits and the character of their entourages as well as the substance — expressed or omitted — of the communiqués concerning the visits afforded evidence. Questions were asked and answered in the Chambers, casual references made in diplomatic dispatches eventually published or in conversations, and the alliance was referred to by cabinet members. All such material when pieced together affords a very precise knowledge of the contracts made [1]). The same process pursued in the case of the Triple Alliance, which, on the whole, is the best-kept secret of its type, resulted in a sufficient knowledge of its stipulations [2]). Secret articles were annexed to the declaration between Great Britain and France of April 8, 1904, respecting Egypt and Morocco. Much was made of them at the time of their publication in the British Treaty Series, No. 24, 1911. Yet they really were not secret at all except in terms. The first article stipulated what portion of the public de-

[1]) In 1913 Pierre Albin in la Paix armée. L'Allemagne et la France en Europe (1885—1894) brought together the evidence. See that work pages 315—377 for a detailed account of such evidence as is here cited.

[2]) See particularly a dispatch to the London *Times* of Dec. 9, 1912, and E. J. Dillon's From the Triple to the Quadruple Alliance.

claration would remain intact if circumstances altered policy, being nothing more than a normal statement under the principle of *rebus sic stantibus*. The second article stated definitely what was obvious on the face of the published articles, the idea of a respective freedom of initiating reforms in Egypt and Morocco. The third article guaranteeing to Spain "a certain extent of Moorish territory.... whenever the Sultan ceases to exercise authority over it" was not news; it had been obvious all along from the adhesion of October 3, 1904, by Spain to the published articles and the agreements of May 16, 1907, respecting maintenance of France-Spanish-British territorial *status quo* in the Mediterranean. The fourth article provides for the case of Spain's declining to enter the arrangement and the fifth article for necessary action concerning repayment of the Egyptian debt [1]).

If secret treaties are not really secret, what, then, may be asked is the cause of their being? I believe it will be found that the aim of every secret treaty will be found in a single purpose, direction toward a third party whose interests or susceptibilities would not be improved by the knowledge of the engagement. As has been indicated, the knowledge does not remain concealed. But if the secret treaty is itself a dishonesty, its frequent cause is an honest impulse, namely, that states arranging to perform some type of autopsy on a third are sufficiently regardful of honest practices to

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[1]) Really nothing needed to be added to the statements made to German diplomats from March 27, 1904, on. See Documents diplomatiques. Affaires du Maroc. No 1, 1901—1904. Pages 122 and 166.

attempt to keept their intentions from becoming public. It is the Macchiavellian advice that the prince should appear to have all the good qualities it is not necessary to possess.

If we lived in a perfect world the secret treaty would from this point of view be more discreditable than it apparently is. But, as things have been some concessions have been made to things as they are. The conduct of public affairs is always a matter of trusteeship, but without the external limits that are internally placed on the acts of a trustee. A sovereign state is comparatively, and in a legal sense wholly, free to do as it pleases; and the temporary trustees of a second state have never been at liberty to sacrifice the public interest by strict adherence to honesty in the face of an opponent's dishonesty. No public will permit that. It therefore has happened, and will happen until international good supervenes above national good, that international affairs have tended to take the complexion of the most reckless or dishonest participant. Betterment has resulted from precedents unregarded at their birth [1]), and usually permitted to be born because the old practices had mechanically got on a dead center.

It follows that one secret treaty breeds another. The cause may be sheer protection, the better balancing of powers against each other or the mere isolation of a problem to be solved without external interference. The Triple Alliance was born of Germany's surprise at the remarkable recovery of France after the Franco-

[1]) Such was the famous arbitral declaration inserted in the 23rd protocol of the Congress of Paris of 1856.

Prussian war, and of a determination to establish a prestige gained by that Teutonic success. The Dual Alliance followed to redress the balance. The third type of secret treaty has found its later uses on the outskirts of the European world. Its subject matter has been the phrasing of policy toward territories in which European control was yet incomplete and native control imperfect.

The generation of one secret treaty by another is perhaps the most vicious feature of the practice. Its epidemiology — as the doctors would say of physical diseases — deserves examination. I have pointed out that secret treaties fail of their secret purpose, being decipherable and actually deciphered by normal methods of ratiocinative detection. But so long as the text remains secret a region of uncertainty exists. Opponents may know all about the aim of the treaty and be sure of its details, but they can never know that they know [1]). When, therefore, a secret treaty generates a secret reply, as is its nature, the retort is more likely to be based on what the first treaty might contain of threat than what it really does contain. Not knowing what the original provides, the response more than balances it; the original negotiators add a codicil; and international relations thus become progressively worsened.

A suggestion has been made that the solution of the secret-treaty problem is to be found through establishing in public law the principle that secret engagements

[1]) I omit from consideration the actual acquiring of texts by means of espionage, a practice more normal in novels than foreign offices.

are void. This suggestion, to be effective, must be accepted by those states which in the past have or might have negotiated such treaties. If they should be convinced that they would have no further use for such treaties, they might still be disinclined to criticize their own past action by making such a change, especially since their intentions gave the same practical result. Those states which have not indulged in secret treaties would not register an advance assenting to such a rule, and might feel that advocacy of it would be a reflection on other states. Establishment of the principle, should circumstances fortunately render these considerations of little weight, would certainly be beneficial on account of being a positive solution of the problem.

This is not impossible because of a philosophical tenet of international law that might be made generally operative. I refer to the custom of proclamation, or promulgation, of a treaty, which is admitted to have the effect of rendering it binding upon the nationals of the state. Conversely, as Bonfils says, in his Manuel de droit international public (par. 831): "Il y a exception pour les traités secrets. L'Etat est lié, mais les sujets ne sont pas obligés, puisque le traité leur est inconnu". There is much to be said for the idea that the state as an entity can and should have relations which its nationals cannot have, but little can be said for the idea that the state as a trustee can and should have relations which its nationals should not know about. A nation which may not know what is best to be done in its own behalf by agents is nevertheless entitled,

if it desires, to know what its agents have done for it. There can be no doubt of the fact that the state is the creation of its inhabitants; the conception of citizens being created for the state is exploded. The relation of all this to the proclamation of treaties is direct. Pan America proclaims treaties on the supposition that the people are the principal and the state their agent. Europe has another philosophical attitude based in part on the theory that the state and the people are separate. In Europe treaties that enjoin specified conduct by citizens are proclaimed, but those which determine the attitude of the state itself are not necessarily proclaimed. Any time when the states decide to examine in conference the mechanism of treaty-making, these considerations concerning proclamation will receive attention, and the decision will tend toward the greater employment of proclamation as a substantive step in rendering treaties enforceable. Beyond that, dependence for a change must be upon a change of attitude among the peoples whose governments can successfully negotiate secret treaties.

In several states secret treaties are permitted by the constitution, and this renders a clearcut and definite reform almost hopeless. No such state could agree to secret treaties being void in principle, for that would infringe the constitution. Likewise, such a state would have to make serious reserves respecting proclamation. Thus, definite reform along those lines would depend wholly upon public opinion in each state. A reform which depends for realization on the way for it being cleared by changes in the constitutions of the states

which may be considered as the culprits cannot be held to offer great promise of success.

Such progress as might be made that way could very profitably follow the conditions provided in Norway, where the constitution (Sect. 75) says: "The Storthing is entitled to be informed.... with regard to secret articles, which must, however, not be at variance with the public ones";.... Minutes regarding such diplomatic matters, "as it has been decided to keep secret shall, however, be laid before a committee chosen from among the membres of the Odelsthing, and consisting of not more than nine membres; such matters may also be brought before the Odelsthing for discussion, if a membrer of the committee should make a proposal to this effect or to the effect that an action should be brought in the High Court of the kingdom (Rigsrėt)".

It seems unlikely that secret treaties can be discontinued until every state is ready to forego their apparent advantages. Certainly if two states make such an engagement a responce is inevitable from those which are affected by it directly or indirectly. Realising the process set up, there is a possible way of making such a response without secrecy. An open treaty whose operation and terms were stated to be conditioned on the terms of the secret treaty would throw the burden of proof on the parties to the secret agreement, who would doubtless try to shift responsibility. The appearance of honest intention is the least virtue a state can assume, and it is always true that a national policy, however vicious, is nationally considered as moral and justifiable in

view of conditions. The way to nullify this psychology is to deprive it of basis. A secret treaty replying to a secret treaty does the opposite, confirms the national conviction of self-righteousness. But an open treaty dependent on the secret for its scope and conditions would indicate plainly even to the citizens of the secret-treaty states that the concealed provisions were the cause of the retrograding situation. No state will stand against so obvious a situation [1]). The problem of the secret treaty is the proper maintenance of the interests of the intended victim without action that will confirm the situation brought about by the secret treaty. An open-treaty reply will accomplish that.

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[1]) An illustration of the operation of this pschology is to be found in the negotiations of Austria-Hungary and Italy concerning the Triple Alliance. These brought out the text of Arts. I, III, IV and VII of the treaty in negotiations apparently without moral foundations, but in which each side sedulously sought to appear right.

TRIAL CONSPECTUS

OF

THE CONDUCT OF FOREIGN RELATIONS.

PREPARED BY

DENYS P. MYERS.

(This conspectus is experimental only, but is believed to be accurate so far as details are given. It is primarily based upon „Treatment of International Questions by Parliaments in European countries, the United States and Japan", British Parliamentary Papers, Miscellaneous No. 5, 1912, Cd. 6102. Information concerning other states has been added from very diverse sources. Omitted from consideration are: China, Liberia, Luxemburg, Montenegro, Persia and Siam).

Minister Reports on Foreign Affairs to	Foreign Affairs in Parliamen
Argentine Republic	
Congress	
Austria-Hungary (Staatsgrundgesetz, Dec. 21, 1867.)	
Delegations on budget vote, with special committees	
Baden (see German Empire).	
Through German Federal Council	Plenary discussion
Bavaria (see German Empire)	
Landtag, as for other business; through German Federal Council	Plenary discussion
Belgium	
Chambers, at will	Committee reports.
Bolivia	
Congress	
Brazil	
President; for Congress.	
Bulgaria	
Discussed in debate on King's speech	Committee reports; bills includ
Chile	
Congress	
Colombia	
Congress	
Costa Rica	
Congress	

arliamentary Action on Treaties	Publications
uired by Congress	Annual report; casual diplomatic books
	Casual diplomatic books
uired for commerce, financial obli-ations, territorial; bills including; o change	Casual diplomatic books
iired by Congress	Annual reports
quired by Congress	Annual reports; casual diplomatic books
	Casual diplomatic books
quired by Congress	Annual reports
quired by Congress; by advice of ninisters and council of state if con-gress is not in session.	Biennial reports
quired by Congress	Annual reports

Minister Reports on Foreign Affairs to	Foreign Affairs in Parliament
Cuba	
President on request for Congress, at discretion.	
Denmark (Constitution, July 28, 1866.)	
Riksdag at will; Folketing in committee	Secret session in committee of wh (little used).
Dominican Republic	
Required to Congress on request; and to President	
Ecuador	
Congress annually; by request, at discretion.	
France	
Commission des affaires extérieures et coloniales, at discretion	Communicated after ratification
German Empire	
Budget committee confidentially; responsible to chancellor; he to emperor	Federal Council assents to conclus on matters in Art. 4, of Constitut Reichstag sanctions.
Great Britain	
House of Commons at Foreign Office vote; interpellations.	Communicated at discretion
Greece	
Interpellations few, at discretion	
Guatemala	
Assembly	
Haïti	
Interpellations; secret session at discretion	

rliamentary Action on Treaties	Publications
ired by Senate; treaties of peace quired by Congress	Annual reports
ired for session, constitutional dification, obligating citizens, financial obligations	Casual diplomatic books
ired by Congress	Annual reports; additional reports
ired by Congress	Annual reports
ired for peace, commerce, persons property of citizens, financial igations, territorial	Annual report by Budget Committee of Deputies; casual diplomatic books
pellation; sanctions on subjects ed in Art. 4. of Constitution	Casual diplomatic books
re legislation is required, before ification	Numerous papers on specific questions
	Casual, for very special occasions
ired by legislative power (Asbly)	Annual reports.
ired by National Assembly (joint sion)	Annual reports

Minister Reports on Foreign Affairs to	Foreign Affairs in Parliamen
Hesse-Darmstadt (see German Empire)	
Through German Federal Council	Plenary discussion
Honduras	
Congress	
Italy	
Interpellation; Foreign Office vote debate; at discretion	Communicated at discretion
Japan	
Interpellations; discretionary	
Mexican States, United	
President for Congress	
Netherlands	
Parliament annually; interpellations; question day	Communicated at discretion
Nicaragua	
President; for Assembly; interpellations at discretion	
Norway	
Council of State; its minutes to Storthing;	Communicated to Storthing, if s
Panamá	
National Assembly	
Paraguay	
Congress	
Peru	
Congress interpellations	

arliamentary Action on Treaties	Publications
quired by Congress	Annual reports
quired for financial obligations	Casual diplomatic books
	Casual diplomatic books
quired by Senate	Annual reports; department bulletin; government daily newspaper
uired for territorial, financial obli- ations; altering legal rights.	Annual ministerial report
quired by Assembly	Annual reports
cussion of foreign affairs	
quired by National Assembly	Biennial reports
quired by Congress	Annual reports
quired by Congress	Annual reports

Minister Reports on Foreign Affairs to	Foreign Affairs in Parliament
Portugal (Constitution, Aug. 21, 1911.)	
Committee on Foreign and International Affairs	
Rumania	
Interpellations; explanatory sessions at discretion	
Russia	
Duma, only by command of Czar	
Salvador	
President; for Assembly	
Saxony (see German Empire)	
Through German Federal Council; interpellations, at discretion	Plenary or committeediscussion
Servia	
Interpellations, without debate	Discussion at secret sessions
Spain	
Interpellations, subject to vote	Vote on policy debate
Sweden	
Constitution Committee on motion; interpellations	Debates; special committees
Switzerland	
Federal Council	Special committees of each chaml
Turkey	
Standing committee (*anljuman*) of Chamber; interpellations	Must be submitted to committee
United States of America	
Annual „Foreign Relations" publication	Executive session of Senate

'arliamentary Action on Treaties	Publications
juired by Congress	Annual reports; casual papers
juired by Parliament	Casual diplomatic books
	Casual diplomatic books
juired by Assembly	Annual reports
	Casual diplomatic books
	Casual diplomatic books
juired for financial obligations or erritorial	Casual diplomatic books
juired by Federal Assembly	Annual report to Federal Assembly
gislative sanction required	Casual diplomatic books
vice and consent of Senate	Annual diplomatic book; papers to Congress and its committees.

Minister Reports on Foreign Affairs to	Foreign Affairs in Parliament
Uruguay	
Chambers	Advice by Senate to initiation on p friendship, alliance, and comm
Venezuela	
Congress	
Wurtemberg (see German Empire)	
Through German Federal Council	Plenary discussion

Article 4. — The following matters shall be subject to the supervision of the Empire and to the legislation thereof:

1. Regulations respecting freedom of migration, domicile, and the settlement of natives of one State in the territory of another; the rights of citizenship; the issuing and examination of passports and surveillance of foreigners; industrial affairs including insurance business, so far as these matters are not already provided for by Article 3 of this Constitution (in Bavaria, however, exclusive of laws relating to domicile and the settlements of natives of one state in the territory of another); and likewise matters relating to colonization and emigration to foreign countries.
2. Legislation concerning custom duties and commerce, and such taxes as are to be applied to the uses of the Empire.
3. Regulation of weights and measures, and the coinage, together with the emission of funded and unfunded paper money.
4. Banking regulations in general.
5. Patents for inventions.
6. The protection of literary property.
7. The organization of a common protection for German trade in foreign countries, for German navigation, and for the German flag upon the high seas; likewise the organization of a common consular representation of the Empire.

arliamentary Action on Treaties	Publications
uired by Genal Assembly	Annual reports
uired by Congress	Annual report; casual diplomatic books

8. Railway matters (subject in Bavaria to the provision of Article 46) and the construction of means of communication by land and water for the purposes of national defense and of general commerce.

9. Rafting and navigation upon those water-ways which are common to several states, and the condition of such waters, as likewise tolls on rivers and other waters; also aids to navigation (lighthouses, buoys, beacons, and other day-marks).

10. Postal and telegraphic affairs; but in Bavaria and Wurtemburg these shall be subject to the provisions of Article 52.

11. Regulations concerning the mutual execution of judicial decrees in civil matters, and the fulfilment of requisitions in general.

12. The authentication of public documents.

13. (Common legislation regarding the law of obligations, criminal law, commercial law, and the law relating to bills of exchange; likewise judicial preceedings).

Common legislation regarding civil rights, criminal law, and judicial procedure.

14. The imperial army and navy.

15. The surveillance of the medical and veterinary professions.

16. Provisions regarding the press and societies.